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THE
BRITISH YEAR BOOK OF
INTERNATIONAL LAW
1958

THIRTY-FOURTH YEAR OF ISSUE

*Issued under the auspices of the
Royal Institute of International Affairs*

OXFORD UNIVERSITY PRESS
LONDON NEW YORK TORONTO

1959

Oxford University Press, Amen House, London E.C.4

GLASGOW NEW YORK TORONTO MELBOURNE WELLINGTON
BOMBAY CALCUTTA MADRAS KARACHI KUALA LUMPUR
CAPE TOWN IBADAN NAIROBI ACCRA

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PRINTED IN GREAT BRITAIN



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THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE, 1951-4: QUESTIONS OF JURISDICTION, COMPETENCE AND PROCEDURE

By SIR GERALD FITZMAURICE, K.C.M.G., Q.C.

Legal Adviser to the Foreign Office

[For the convenience of readers a table of contents for this article (showing the main but not the subsidiary heads) has been added at pp. 160-1.]

INTRODUCTION

THE present article constitutes the last in the series of five articles on the jurisprudence of the International Court of Justice during the period 1951-4, which have appeared in volumes 30-34 of this *Year Book* (1953-8), following on a previous series of three articles covering the period 1948 (when the Court gave its first judgment¹) to 1951.² The general pattern of each cycle has remained the same, although the number of articles in the cycle has varied.³ It is proposed to deal with the period 1954-7 in a third cycle of articles to commence in the next volume.⁴

The sub-title of the article corresponding to the present one in the series for 1948-51 was 'International Organizations and Tribunals', and Chapter I of that article had as its subject 'International Organizations, with particular reference to the Charter of the United Nations', most of the chapter being in fact taken up with points relating to the United Nations.⁵ Chapter II was entitled 'Questions of Competence and Procedure', but, apart from a

¹ In the *Corfu* case (Question of Competence), by the Judgment dated 25 March 1948.

² For the general object and scope of these articles and the cases covered by them, see the introductions to those for 1950, 1952 and 1953, and the relevant footnotes thereto; also footnote 1 on p. 371 of the 1954 article.

³ Because the topic of 'General Principles and Substantive Law' which, in the first cycle, was dealt with in one article, had to be spread over three in the second. The pattern is now approximately as follows: I—General Principles and Sources of Law; II—Particular Points of Substantive Law; III—Treaty Interpretation and other Treaty Points; IV—International Organizations; V—Questions of Competence and Procedure. As explained in the text, head IV is missing in the present cycle.

⁴ As foreshadowed in footnote 1 on p. 203 of the article for 1957, the articles comprising the first two cycles, after consolidation and revision, will be published in book form as soon as possible. It is hoped to include the third and ensuing cycles in additional volumes or in later editions or supplements. The third cycle (1954-7) will cover the following cases: the *Monetary Gold*; *Nottebohm* (merits); *U.N. Administrative Tribunal*; *I.L.O. Administrative Tribunal*; *South-West Africa, Voting Procedure*; *South-West Africa, Petitioners*; and the various *Aerial Incident* and *Antarctica* cases—these last not being the subject of a substantive judgment by the Court on their merits, but involving certain points of jurisdiction and procedure.

⁵ Such points arise mainly on requests for advisory opinions, and whereas in the initial period six such requests were made, in the second there was only one (*Reservations to the Genocide Convention*).

section devoted to certain questions affecting the competence of international tribunals in general,¹ it dealt mainly with the competence and procedure of the International Court itself. In the period 1951-4 on the other hand, the Court had virtually no occasion to pronounce on points relating to the United Nations or other international organizations.² The chapter on the United Nations and other international organizations has therefore necessarily been omitted,³ although certain points affecting the United Nations arise and are dealt with in the section on advisory opinions.⁴

STATUS OF RESOLUTIONS OF THE UNITED NATIONS ASSEMBLY

Although the Court itself made no pronouncement in this period on United Nations questions, apart from those connected with requests for advisory opinions, Judge Alvarez, in his dissenting opinion in the case of *Reservations to the Genocide Convention*, appeared to get near to attributing a semi-legislative character and effect to the resolutions of the United Nations General Assembly, saying (*I.C.J.*, 1951, 52):

'In addition to the multilateral conventions which have just been mentioned,⁵ the Assemblies of the United Nations pass Declarations and Resolutions of a very important nature. These Declarations do not require ratification, and, by reason of their

¹ See this *Year Book*, 29 (1952), pp. 55-57.

² For the reasons given in n. 5, p. 1 above.

³ A chapter under this heading will reappear in the forthcoming third cycle, since in the period 1954-7 the Court had occasion to make a considerable number of pronouncements on United Nations and kindred matters.

⁴ See § 3, p. 138 et seq. below.

⁵ As to these, Judge Alvarez said (*I.C.J.*, 1951, 51):

'In this respect, this law includes within its domain four categories of multilateral conventions, three of which were formerly unknown: (a) those which seek to develop world international organization or to establish regional organizations, such as the European organization which is of such great present-day interest; (b) those which seek to determine the territorial status of certain States; such conventions have existed in Europe since the beginning of the XIXth century, and have constituted what may be called "European public law"; (c) conventions which seek to establish new and important principles of international law; (d) conventions seeking to regulate matters of a social or humanitarian interest with a view to improving the position of individuals.'

It may readily be admitted that certain kinds of multilateral conventions involve legal considerations of a kind not applicable to others, or to bilateral treaties; and the present writer has sought to elucidate some of the points thereby involved in his three 'Reports on the Law of Treaties' for the International Law Commission of the United Nations, published in the *Year book of the Commission for 1956, 1957, and 1958*. Such conventions are regarded by Judge Alvarez (*loc. cit.*) as being 'the new international constitutional law'. Politically, they may be, but how far treaties and other international agreements, even multilateral so-called 'law-making' ones, really constitute in the *jurisprudential* sense 'law', as opposed to media of particular legal obligations for those States which are parties to them, involves a difficult question considered in the present writer's contribution to the *Symbolae Verzijl* (Martinus Nijhoff, 1958), 'Some Problems Regarding the Formal Sources of Law', in which he put forward the view that such treaties (contrary to a very general belief) are not strictly formal sources of law, though they may be declaratory of law (where they codify existing customary law), or *material* sources of law where they eventually inspire and lead to a general practice accepted as law and followed even by States not parties to the treaty concerned.

nature are not susceptible to reservations; they have not yet acquired a binding character, but they may acquire it if they receive the support of public opinion, which in several cases has condemned an act contrary to a Declaration¹ with more force than if it had been a mere breach of a convention of minor importance.²

'In short, the Assembly of the United Nations is tending to become an actual international legislative power.'

Since Judge Alvarez stated in this passage that Assembly resolutions do not have a (legally) binding character, it may be assumed that, in speaking of the legislative tendencies of the Assembly, he was actually thinking of the moral rather than of the legal effect of its resolutions and declarations (though looking towards a day when these might also have acquired a legally binding character³).

FUNDAMENTALLY RECOMMENDATORY CHARACTER OF ASSEMBLY RESOLUTIONS

There can be no doubt as to the non-binding effect of Assembly resolutions in the sense of not imposing any obligation on member States of the kind which, for instance, would result for them under Article 25 of the Charter from an unvetoed decision of the Security Council. This distinction between the effect of Security Council decisions on the one hand, and Assembly 'decisions' on the other, is fundamental to the United Nations as an organization, according to its present conception; and an amendment of the Charter (with all that this entails) would be necessary to alter the position. However, it would be incorrect to say that *no* resolution or decision of the Assembly has any obligatory force.⁴ This depends on the kind of resolution or decision involved, and on the character of the entity or entities to which it is addressed. The following cases may be noticed:

¹ A good example of such an instrument, doubtless present to the mind of Judge Alvarez, would be the Universal Declaration of Human Rights adopted by the Assembly in December 1948.

² It must be assumed that Judge Alvarez was here thinking mainly of the moral force which public opinion may lend to certain instruments, giving them in some cases a greater practical influence than that attaching to others that are legally binding but less highly regarded as embodying a moral purpose.

³ The present writer has on previous occasions in these series referred to the interest attaching to the pronouncements of Judge Alvarez (who left the Court in February 1955, and is now over 90 years of age). These, if not always acceptable as orthodox and immediately applicable statements of the law, have frequently contained ideas of great legal interest in which the germ of various lines of legal development can be discerned. In his utterances there often figures a prophetic element—a point well brought out in a recent interesting study of his thought by Professor Jean Dupuy, *Les Principes Fondamentaux du Droit International dans la Doctrine de M. Alejandro Alvarez (1ère partie)* (Paris, 1958).

⁴ For a comprehensive study of this matter see 'The Binding Force of a "Recommendation" of the General Assembly of the United Nations', by Mr. F. Blaine Sloane of the United Nations Secretariat, in this *Year Book*, 25 (1948). However, Mr. Sloane attributes a considerably higher degree of force to Assembly recommendations than the present writer would feel able to admit.

(1) *Decisions of the Assembly relating to its own domestic procedures or economy*

There is one class of Assembly resolution which can be called binding for all member States, namely, resolutions which the Assembly, so to speak, addresses to itself, in which it takes a decision affecting its own internal economy or action, e.g. it adopts a new rule of procedure, or appoints a Commission to investigate a certain matter,¹ or it sets up a new subsidiary organ, or decides to hold its next session at a certain place, or to include a certain item in the budget,² and so on. In all these cases there is a decision of the Assembly, and, so far as the point arises, it is binding on Members in the sense that the Secretariat and others are entitled to act accordingly, while the resulting action cannot be objected to even by Members who voted against the resolution. Apart from this kind of case, which is usually fairly self-evident when it occurs, the matter falls into three broad heads: the direct effect of Assembly resolutions addressed to member States; their indirect or permissive effect; and their effect in respect of other organs of the United Nations, and for the Specialized Agencies.

(2) *Effect of Assembly resolutions addressed to member States*(a) *Direct effect*

The question here is whether a decision of the Assembly, calling upon member States to do a certain thing, is mandatory. The answer is clearly in the negative. The Charter contains a provision, Article 25, making decisions of the Security Council binding, Members agreeing to accept and carry them out; but there is no corresponding provision in regard to decisions of the Assembly, and the inference is that, however these are framed, whether as mere recommendations or in stronger terms (such as 'invites' or 'calls upon'), Members cannot be bound to carry them out unless they have independently agreed to do so. Each Member may decide for itself whether it will actually do so or not.³ Where, as in many cases, the resolution is framed as a recommendation, or as an authorization, to certain action, this is still clearer. Seven Judges of the International Court in the *Corfu* case⁴ said that a recommendation, as its name implies, is only a recommendation, and that this is so even in regard to recommendations

¹ Such a Commission could not of course proceed to, or carry out its investigations in given countries without the consent of those countries. But it can be established on the basis of the Assembly's decision without specific consents.

² If a certain item is voted into the budget, it becomes part of the budget of the organization, to which Members are already bound by Article 17 of the Charter to contribute their share as apportioned by the Assembly.

³ Even a vote in favour of a given resolution would not, it seems, bind the member State concerned actually to carry it out—for such a vote cannot alter the status of the resolution or cause it to be other than recommendatory.

⁴ *I.C.J.*, 1948, 31-32.

of the Security Council.¹ *A fortiori* would this be the case as regards Assembly resolutions.

(b) *Permissive effect*

(i) *No directly permissive effect.* Here the question is how far an Assembly resolution, though not obliging member States to take certain action, may act as an authority to them to do so, even though they would not ordinarily have been entitled to take the action in question: i.e. how far such a resolution can operate to release a member State from a pre-existing obligation. Suppose, for instance, that the Assembly recommends or calls upon Members to cut off trade relations with a certain country; but that this could only be done by a given member State if it were prepared to disregard the provisions of a commercial treaty with that country. Such a position would not be governed by Article 103 of the Charter, for this only provides for the case of a conflict between the *obligations* of member States under the Charter and their obligations under any other international instrument, in which event the former are to prevail. It follows that—as regards decisions of the Security Council—since Members have an obligation under the Charter to carry them out, they would be justified for this purpose in breaking a pre-existing treaty, and indeed bound to do so, so far as the Charter goes. But, as they are not under any direct legal obligation to carry out Assembly resolutions, they could not plead any conflict of *obligations*. The conflict would be between a pre-existing obligation and a present recommendation, which the Member might like to carry out but was not obliged to. The pre-existing obligation would therefore prevail, in law. The position would be broadly the same as regards obligations existing under the general rules of international law. Moreover, it must be assumed that it is not the intention of the Assembly to call upon its Members to act in breach of the ordinary rules of international law, and its resolutions must be interpreted accordingly.

(ii) *Indirectly permissive effect.* Nevertheless, Assembly resolutions might sometimes *in practice* enable member States to act in a manner capable of being represented as contrary to their strict international obligations. For instance, there may be room for doubt as to the exact character and extent of these obligations, in which case an Assembly resolution calling for action in a certain sense may justify an interpretation of the obligation such as to allow of compliance with the resolution. However, this opens up a semi-political vista going beyond the scope of this article, and it will be sufficient to register the point that an Assembly resolution may sometimes, irrespective of strict legality, operate indirectly to authorize, or at any rate to permit, certain things to occur with impunity.

¹ See account in this *Year Book*, 29 (1952), pp. 31-33.

(3) *Effect as regards other organs of the United Nations and the Specialized Agencies*

(a) *Other United Nations organs*

(i) *The Economic and Social Council and the Trusteeship Council.* Clearly the Assembly cannot bind the Security Council; but it has sometimes been suggested that, although both the Economic and Social Council and the Trusteeship Council are, like the Assembly and the Security Council, main organs of the United Nations, the Assembly can bind these bodies because, in the Articles of the Charter dealing with them, there figures a provision stating that they are to operate under the general authority of the Assembly.¹ This is not the place to go into the exact effect of this provision, but if the effect were that all resolutions of the Assembly were automatically binding on these bodies, this would constitute an indirect means of binding member States represented on them, although, as ordinary Members of the United Nations, such States would not be directly bound by the Assembly resolution itself.² Such a position would also have a tendency to compromise, and even nullify, the distribution of the representation on these bodies. This is especially true of the Trusteeship Council, which is purposely constituted so as to secure a balance between the countries administering trust territories and those not administering them. In the Assembly itself, however, the balance is all one way, i.e. with the non-administering countries. If an Assembly resolution could automatically oblige the Trusteeship Council to do certain things, even things which the Trusteeship Council, itself voting on the basis of its actual representation, would not have done, then the voice of the administering authorities on the Council would in practice be swamped and nullified. Similar considerations apply in a general way to the Economic and Social Council, the members of which are elected on a definite basis, having regard to geography and economic considerations.

On the other hand, where an Article of the Charter specifically provides that these bodies must act in such manner as the Assembly prescribes, they are clearly bound to do so in relation to the matter covered by the Article.

(ii) *The Secretariat of the United Nations.* This is also a main organ of the United Nations in virtue of Article 7 of the Charter, a point that is often overlooked. The Secretariat serves all the organs of the United Nations and cannot be under the exclusive orders of one of them. However, Article 98 of the Charter provides that the Secretary-General is to perform all such functions as are entrusted to him by the organs he serves, and he is in that sense under the directions of the Assembly (*inter alia*); but most of those directions will fall into the, so to speak, self-executing category mentioned under heading (1) above.

¹ See Articles 60 and 85.

² And who might even have voted against it.

(iii) *The International Court*. This is also constituted a main organ by Article 7. But the question of the Assembly attempting to give directions or make recommendations to the Court hardly arises. The functions and activity of the Court are wholly governed by Chapter XIV of the Charter, and by its own Statute which is annexed to the Charter and forms an integral part of it. This leaves no scope for Assembly intervention except in a purely administrative, e.g. budgetary, capacity. The Court is not even *bound* to give the Assembly an advisory opinion when requested, though it will not normally refuse.¹

(iv) *Subsidiary organs of the Assembly itself*. Article 22 of the Charter allows the Assembly to set up subsidiary organs 'for the performance of its functions'. Such organs, unlike the main organs of the United Nations considered above, are Assembly organs and must therefore act in accordance with the instructions of the Assembly.

(b) *The Specialized Agencies*

It is clear that Assembly resolutions cannot be binding on the Specialized Agencies. The first reason for this is that the Specialized Agencies have a different membership, and many of them have as Members, States which are not Members of the United Nations. These Agencies may be affiliated to the United Nations, but they are separate international entities, and can only be bound by their own decisions. Secondly, if Assembly resolutions were binding on the Specialized Agencies, this would constitute an indirect means of binding member States of the United Nations itself, by Assembly resolutions which would not themselves be directly binding on those States. Suppose, for instance, the Assembly recommended a certain course of action to member States. Such a recommendation would not be binding on Members (see paragraph (2) (a) above). If, however, it could be argued that it was mandatory upon a given Specialized Agency to carry out a similar recommendation if addressed to it, then, as Members of the Specialized Agency, many Members of the United Nations would find themselves obliged in practice to carry out the resolution or to contribute towards its carrying out. This point is similar to that made in paragraph (3) (a) (i) above, in respect of the Economic and Social, and Trusteeship, Councils; but is even more pertinent in the case of the Specialized Agencies.

¹ See below, § 3 (i) on p. 139.

DIVISION A: JURISDICTION AND COMPETENCE

§ 1. GENERAL PRINCIPLES OF JURISDICTION AND COMPETENCE

(I) PRELIMINARY OBSERVATIONS—TERMINOLOGY

(1) *The terms 'jurisdiction' and 'competence'*

It may be useful by way of introduction to refer to a point made in the corresponding articles in this series on the 1948-51 period, in connexion with the *Corfu Channel* case.¹ On the basis of certain remarks made by Dr. Daxner, acting as Albanian Judge *ad hoc* in that case, it was suggested that there is a distinction between jurisdiction and competence, and that although these terms are often used interchangeably, they ought probably each to be confined to a particular aspect of the matter. No doubt this distinction is one which, as a matter of terminology, appears mainly in the English rather than in, for example, the French language.² But that merely means that in French the term *compétence* is often used in two senses so that the distinction of substance remains. There is the question of the general class of case in respect of which a given tribunal has jurisdiction—the tribunal's jurisdictional field, whether *ratione materiae*, *personae* or *temporis*; and there is the question of its competence to hear and determine a particular individual case—e.g. the case may not fall, *ratione materiae*, within the tribunal's general field; or, even if it does, may be excluded on grounds arising *ratione personae* or *ratione temporis*. A tribunal may have jurisdiction in the 'field' sense, yet lack competence as regards the particular case: basic jurisdiction does not necessarily entail competence in the

¹ This *Year Book*, 29 (1952), pp. 40-42.

² Not always, for, as was pointed out in n. 1 on p. 42 of the 1952 article, the French text of Article 36 of the Statute of the Court uses '*compétence*' in one place and '*jurisdiction*' in another. As the same note shows, there is confusion in the terminology of both texts of the Article and of the Chapter in which it occurs. Mr. S. Rosenne, in his recent magisterial work *The International Court of Justice* (Sijthoff, Leyden, 1957), pp. 252-3, the indebtedness of the present writer to which will herein be readily apparent, has drawn attention to other confusions in the use of these terms, both in the Charter and in the Statute, though he does not regard the matter as of the first importance in the international field. He suggests certain other bases of distinction between the two terms, e.g. (p. 253) that in the Statute, 'jurisdiction' (this would be in the English text presumably) is used mainly with reference to litigious cases, and 'competence' mainly in connexion with advisory opinions. He also suggests (*ibid.*) that '... "jurisdiction" is a stricter concept than "competence". "Jurisdiction" relates to the capacity of the Court to decide a concrete case with binding force. "Competence", on the other hand, is more subjective, including both jurisdiction and the element of the propriety of the Court's exercising its jurisdiction.' It is clear therefore, that although the actual conclusion may not matter very much, some agreed conclusion tending towards uniformity of terminology is very desirable. In the *Nottebohm* case (Jurisdiction), the Court referred to the literal meaning of the term 'jurisdiction' as 'the power of administering justice' (*I.C.J.*, 1953, 121) but stated (*ibid.*) that the Court was 'not concerned with defining the meaning of the word "jurisdiction" in general'. It is noticeable that in the French text, the term *jurisdiction* is used in these particular passages, but that everywhere else the French text speaks of *compétence* where 'jurisdiction' is used in the English.

particular case. Want of jurisdiction in the 'field' sense, on the other hand, necessarily involves incompetence to determine the particular case. Moreover, there is involved not merely a double requirement, that the tribunal should possess jurisdiction in respect of the general field and also competence as regards the particular case, but a fourfold (or perhaps even a sixfold) requirement, for each of the two basic requirements must be satisfied in two or three separate realms, namely, *ratione materiae*, *ratione personae* and *ratione temporis*.¹ Thus (assuming that in practice tribunals always function within a restricted or regulated field as regards the category of case they can deal with, the entities in respect of which they can adjudicate, and the period within which the dispute must have arisen, or to which its facts must relate; or as to the date at which the parties must be subject to the tribunal's jurisdiction) it may be said (i) that not only must the tribunal have jurisdiction in respect of some given class of case, but also, the particular case must come within that class; and (ii) not only must the tribunal have jurisdiction with respect to some given class of entities¹, but also, the parties in the particular case must belong to that class; and (iii) not only must the tribunal have jurisdiction as respects disputes arising within some given period or the facts of which relate to such a period, but also, the particular dispute must have arisen within that period, or its facts must relate to that period, or both—and, similarly, if there is a date at which the parties must be subject to the tribunal's jurisdiction, then they must in the particular case have become subject to it at that date.² In short, the jurisdiction of any tribunal can be faulted under any of these heads by showing either that the tribunal does not possess jurisdiction in the particular material, personal or temporal field to which the case relates, or that, the tribunal being possessed of a certain field of jurisdiction, material, personal and temporal, the particular case falls in some essential respect outside that field.

(2) *Importance of jurisdictional issues in the international field*

Whereas in the domestic field, always excepting the case of federal States, jurisdictional issues are relatively unimportant and infrequent (that is in

¹ e.g. States not individuals; or those States which are parties to a particular treaty; or which have signed a protocol accepting the tribunal's jurisdiction, &c.

² Rosenne, however (see *op. cit.*, in n. 2, p. 8, above, at p. 274) and perhaps rightly, prefers to regard jurisdiction and competence *ratione temporis* as a branch or element of jurisdiction and competence *ratione materiae* or *ratione personae*, as the case may be. Thus, if the tribunal is only empowered to deal with cases arising after a certain date, this can be expressed *ratione materiae* by saying that the tribunal's jurisdictional field comprises and is confined to the class of disputes arising after that date. Similarly, it can be said that a tribunal's jurisdictional field *ratione personae* comprises and is confined to the class of such entities as have capacity to accept its jurisdiction and have in fact done so at whatever is the relevant date—normally (as Rosenne says) 'the date of the institution of the proceedings'. Consequently, Rosenne (*op. cit.*, pp. 254-5) limits the various aspects of jurisdiction and competence to four instead of six, and considers that these were well exemplified in the statement by Dr. Daxner referred to at the beginning of the present subsection.

proportion to the total number of domestic litigations), the exact opposite is the case in the international field. Indeed, a distinguished authority has called jurisdictional questions 'the core of the work of the Court'¹, and again²: 'The complexity of the issue of jurisdiction, and the far reaching ramifications of the results of a decision . . . on a question of jurisdiction, are reflected in the prominent place which these questions occupy in the general practice of the Court.³ . . . The question whether and to what extent the Court has jurisdiction is frequently of no less, if not of more, political importance than the decision on the merits.' Another, very eminent, authority has stated⁴ that: 'The prominence of the jurisdictional issues before the Court is illustrated by the fact that, with few exceptions, in all cases in which a defendant State has been brought before the Court by unilateral application,⁵ it has pleaded to the jurisdiction of the Court.' In short, as Mr. Rosenne says, 'When jurisdictional issues are raised by a party, it is a certain indication of the absence of political agreement⁶ that the Court should adjudicate. They should never be regarded as mere technical issues.' The various differences between the domestic and the international positions respecting jurisdictional issues cause Rosenne to say that in approaching international questions of jurisdiction 'it is necessary to put aside all notions having their origin in concepts of municipal law'.⁷ Two points of difference can be singled out as being of special importance, and as going far to account for the prominence of jurisdictional issues in the international field.⁸

(a) First, the obligation of the citizen in the domestic field to answer in court depends not on his own volition but upon the law of the land, which alone determines what tribunals have jurisdiction and in respect of what persons and suits. In the international field, the obligation of any State to appear before an international tribunal, and consequently the jurisdiction of the tribunal and its competence to hear a particular case, depends directly or indirectly upon the agreement of the parties.⁹ It follows that by denying the existence or reality of its consent, the defendant State can create the possibility of shutting out the proceedings on the merits alto-

¹ Rosenne, *op. cit.*, p. 249.

² *Ibid.*, pp. 337-8.

³ For instance, in the period 1951-4 now under review, approximately half the contested cases turned on or involved jurisdictional issues.

⁴ Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (revised and enlarged edition; Stevens & Sons, London, 1958), p. 94.

⁵ Except where, as in the *Norwegian Fisheries* case, although the proceedings were formally instituted by unilateral application, the parties were agreed in going to the Court, and the method of initiating the proceedings by unilateral application was selected for reasons of convenience or because of domestic factors.

⁶ Whether there is agreement in *law*, and consequently a legal obligation to appear, depends of course on the jurisdictional decision itself. The difference is between the willing and the unwilling litigant.

⁷ Rosenne, *op. cit.*, p. 249.

⁸ *Ibid.* and p. 338.

⁹ See section (III) below.

gether, and avoid not merely a substantive decision regarding these but having to plead to the merits at all.¹ The chances of successfully doing this are probably considerably greater when the outcome of any jurisdictional objection depends not so much on the application of definite rules of law concerning the competence of the tribunal, but rather of deciding (as a mixed question of fact and interpretation, and on a basis that may involve a considerable subjective element) whether a valid consent has been given or not. Since the onus of establishing consent, if its existence or validity is denied, rests in the last resort on the plaintiff State, and the consent has to be established beyond reasonable doubt,² the inducement to raise jurisdictional issues is obviously very considerable, and goes far to account for the frequency with which they are raised internationally.

(b) Secondly, whereas in the domestic field jurisdictional issues present themselves directly or indirectly mainly as *conflicts* of jurisdiction, i.e. as questions of *forum*, this is not at all the case in the international field. Just as in the domestic field it is rare for no court at all to have jurisdiction, and the issue is usually which of two or more possible forums is the correct one, or whether the actual forum is the right one, so, conversely, is it a rarity in the international field for there to be any possibility of more than one forum.³ The usual question is not which of various competing forums is the correct one, but whether any tribunal at all has jurisdiction. As a rule, if any tribunal has jurisdiction, there is only one possible tribunal that can have it.⁴ The issue is whether even that tribunal has jurisdiction. The point was aptly made by Judges Winiarski and Badawi in their dissenting opinion in the *Anglo-Iranian Oil* case (Interim Measures) in which they stated (*I.C.J.*, 1951, 96-97):

'The question of the jurisdiction of the national tribunal does not in practice arise;

¹ As Sir Hersch Lauterpacht says (*op. cit.*, p. 91): 'When appearing before the Court as defendants under a clause giving it compulsory jurisdiction, Governments show no reluctance to plead that they have not in fact conferred upon it jurisdiction in regard to the matter in dispute.' A defendant government cannot, of course, avoid a decision on, and pleading to, the jurisdictional issue, which, indeed, it will have raised itself except in those cases (see section (II) (1) (b) below) where it may have been raised by the tribunal *proprio motu*. Nor will the defendant party always avoid an investigation of (though it will, if successful on the jurisdictional issue, avoid a *decision* on) the merits, for sometimes the tribunal will join these to the issue of jurisdiction (see subsection (6) (c) below).

² It has been put even higher—see Rosenne, *op. cit.*, in n. 2, p. 8, above, at p. 260, and remarks in section (III) (3) (a) below.

³ Such a situation can, of course, arise where it is possible to maintain, for example, that the same State has incurred (perhaps under different treaties or declarations) two separate obligations to go to arbitration on the same subject-matter, involving two different tribunals. This issue was pronounced upon by the former Permanent Court in the *Chorzow Factory* case (Jurisdiction), Series A, No. 9, p. 30; and also in the *Electricity Co. of Sofia* case, Series A/B, No. 77, p. 76.

⁴ The *Ambatielos* case illustrates the exception, for in the first phase of the case it was contended by the Greek Government that the Court as well as a certain arbitral Commission had jurisdiction to determine the merits of the claim, and the Court found against its own jurisdiction, and (in the second phase of the case), in favour of that of the Commission.

the application is made to the competent tribunal; if the tribunal has no jurisdiction it will not order interim measures. But, in municipal law, there is always some tribunal which has jurisdiction.'

The reasons for the difference are clear. As Rosenne says,¹ there is in the international field 'no hierarchy of courts with pre-determined jurisdiction', but 'a . . . haphazard multiplicity of courts, with no pretence of schematic hierarchy between them, each having jurisdiction to the extent specified in the international treaty by which it was established, that is to say . . . to the extent to which the States concerned have consented to the jurisdiction of the Court'. Since the national law will normally ensure that there is *some* domestic forum competent to hear and determine all cases involving breaches of that law, or the assertion of rights under it, it follows that domestic jurisdictional issues are of secondary importance, because a claimant who fails on jurisdictional grounds in one forum can start again in the correct one. Thus, as a general rule, there is no avoiding a determination on the merits if the claimant persists, and the defendant obtains no ultimate advantage by raising jurisdictional issues.² It is far otherwise in the international field where a jurisdictional objection, if successful, will normally dispose of the case entirely, and rule out any further proceedings, not only before the tribunal rendering the jurisdictional decision, but before any other. In the international field therefore, such issues assume a far greater, and usually a fundamental importance.³

(3) *Jurisdiction and admissibility*

Although objections under both these heads are, as a general rule,⁴ in the nature of 'preliminary objections', and in both cases—again as a general rule⁵—the aim is to prevent (and the objection, if successful, does prevent) a decision on the merits, there is a clear jurisprudential distinction between an objection to the jurisdiction of the tribunal, and an objection to the substantive admissibility of the claim. The latter is a plea that the tribunal should rule the claim to be inadmissible on some ground other than its ultimate⁶ merits: the former is a plea that the tribunal itself is incompetent

¹ Op. cit., p. 249.

² Except perhaps that of ensuring that any decision on the merits given in *favour* of the defendant is not subsequently called in question on jurisdictional grounds.

³ Imponderables may also enter in. To set against the reluctance which a tribunal may sometimes feel to finding against its own jurisdiction, there is the solution which such a finding may provide in those cases where the necessity of giving a decision on the merits would involve unusual difficulty or embarrassment for the tribunal.

⁴ Not necessarily always—see Rosenne, op. cit., pp. 244–5.

⁵ Sometimes, for instance, as in the third phase of the *Ambatielos* case before the eventual Commission of Arbitration (see n. 1, p. 14, below), the parties may expressly request the tribunal to pronounce both on the preliminary objections and the merits.

⁶ This term is used because often a preliminary objection—based, for example, on the nationality of the claimant, or the question of exhaustion of legal remedies, or of undue delay, is

to give any ruling at all whether as to the merits or as to the admissibility of the claim. A successful challenge to the jurisdiction stops¹ all further proceedings in the case, or at any rate ensures that there is no finding on the merits.² But an unsuccessful jurisdictional plea leaves open the possibility that a finding on the ultimate merits may still be excluded through a decision given against the substantive admissibility of the claim. The Permanent Court was inclined to question the importance of this distinction in international proceedings, whatever its relevance might be in the domestic field.³ It is no doubt possible to sustain such a view, because of the similarity of the ultimate aim of the two types of plea, and of their effect if successful—namely, to preclude a decision on the actual merits. Nevertheless, the distinction ought to be maintained, both on account of its jurisprudential importance and because it may involve considerable differences of treatment and procedure in particular cases. In the period now under review, the distinction was clearly recognized by the Court in the *Ambatielos* case. The Court was there faced with (a) a challenge (i) to its own jurisdiction to hear and determine the substantive merits of the claim, (ii) to its competence to determine whether under a particular treaty the case ought to be referred to another international tribunal; and (b) with a challenge to the substantive admissibility of the claim on grounds of undue delay in bringing it, non-exhaustion of local domestic remedies, &c. Having found that it had, itself, no jurisdiction to determine the merits, but that it had jurisdiction to decide whether the case ought to be referred to this other tribunal, and having subsequently found that in fact the claim must be submitted to the other tribunal, the Court then went on as follows (*I.C.J.*, 1952, 22-23):

‘There remain for consideration contentions advanced by the United Kingdom Government that, even assuming the facts alleged by the Hellenic Government to be true, the United Kingdom still is not obliged to submit to arbitration the difference as to the validity of the *Ambatielos* claim,⁴ for the following additional reasons:

‘(1) That Mr. *Ambatielos* did not exhaust local remedies;

‘(2) That there was undue delay in preferring the claim on its present alleged basis;

connected with, and not entirely without relevance to, the substantive merits, and is often more closely related to these than purely jurisdictional issues.

¹ Though as *Rosenne* shows (see n. 4, p. 12, above), the objection itself may not always be taken immediately.

² There may be full pleadings and a hearing on them in those cases where the preliminary objection, whether jurisdictional or other, is joined to the merits.

³ See, for instance, the *Mavrommatis* case, Series A, No. 2, p. 10, and the *Polish Upper Silesia* case, Series A, No. 6, p. 19.

⁴ Although the basic question in the case was, in form, the obligation of the United Kingdom to submit the substantive dispute to arbitration, the question arises whether the finding that there was such an obligation amounted in effect to a finding that the Commission of Arbitration (to which, under a certain treaty clause, the parties had agreed to refer this class of dispute) would be competent to entertain it. This is discussed in section (II) (3) below.

(3)

'With regard to the first two arguments, the Court need only observe that they are arguments in defence directed to the admissibility of the Ambatielos claim and are not in any way related to the question whether the claim is based on the Treaty of 1886—[i.e. the jurisdictional issue]. . . . For these reasons the Court expresses no view concerning the validity or legal effect of these arguments.'

In consequence, these objections as to admissibility were left to be taken (and were eventually argued) before the Commission of Arbitration which finally disposed of the case.¹ The distinction between questions of jurisdiction and questions of admissibility was also recognized by the Court in its unanimous decision in the *Nottebohm* case (Jurisdiction). Referring to the powers conferred upon it by the Statute the Court said (*I.C.J.*, 1953, 122) that it must exercise these

' . . . whenever it has been regularly seised and whenever it has not been shown, on some other ground, that it lacks jurisdiction or that the claim is inadmissible.'

And again (*ibid.*, 123) that once this condition (of being duly seised) had been satisfied

' . . . the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to merits.'

(4) *Jurisdiction and seisin*²

The concept of the Court's 'seisin'—or state of being seised of a dispute, which may tend to be confused with that of its competence to hear and determine it—was considered by the Court in the *Nottebohm* case (Jurisdiction), and certain important points were elucidated.

(a) *Distinction between jurisdiction and seisin.* It will be seen that in the passages from the *Nottebohm* case quoted at the end of subsection (3) above, the Court in effect distinguished between seisin and jurisdiction—seisin depending on the carrying out of the correct procedural steps for bringing the dispute before the Court, as prescribed by the Statute and Rules of Court. Admittedly, if a tribunal has not been duly seised it is incompetent to hear the case. But it does not follow that because the tribunal is duly seised, and has therefore the seisin of the case, it possesses

¹ For a description of the eventual Commission which sat in London from January to March 1956, under the presidency of Dr. R. J. Alfaro of Panama, see this *Year Book*, 32 (1955-6), p. 83, n. 1.

² It is curious that whereas the word 'seisin' is used on p. 120 of the Judgment, as the correct equivalent in the context of the French term '*saisine*', the term 'seising' is elsewhere incorrectly used to express the same idea. This latter term (seising) denotes the act or process of seising a tribunal, and is best not employed for the state or condition of being or having been seised (seisin).

on that account substantive jurisdiction and competence to hear and determine it on the merits. What seisin gives is jurisdiction and competence to determine this very point. It might therefore be said to confer jurisdiction or competence on the tribunal in the procedural sense. But 'substantive jurisdiction'¹ and competence will necessarily depend on other factors. It is clear, however, that without the measure of procedural competence which only a valid and regular seisin can confer, but which such a seisin, when effected, does of itself entail—the tribunal would be unable to determine its substantive jurisdiction if in question, or otherwise uncertain; and the inherent power of international tribunals to determine their own jurisdiction² (the *compétence de la compétence*), would be nullified. The same distinction, between seisin and substantive competence, is also the basis of the whole jurisdiction by *forum prorogatum*, for if the validity of the seisin is independent of the existence or non-existence of substantive jurisdiction at the time of the seising, it follows that substantive jurisdiction may be conferred upon the tribunal, or perfected, *after* the seising—e.g. by express agreement between the parties, or by the defendant State's *ad hoc* acceptance of, or submission to, the jurisdiction invoked by the plaintiff State through the act of seising the tribunal.³

(b) *Effect on a tribunal's jurisdiction, if existing at the time of seisin, of events occurring subsequent thereto.* It has already been seen that if the tribunal's jurisdiction is *not* complete at the date when it is first seized of the dispute, e.g. by a unilateral application, its jurisdiction can nevertheless be perfected by a subsequent event, e.g. *ad hoc* acceptance by the party cited, or voluntary submission of that party (*forum prorogatum*). Equally, of course, in the case of jurisdiction being imperfect at the date of the seisin, the applicant State can withdraw its application at any time before an acceptance of, or submission to, the jurisdiction on the part of the State cited. In the case of the International Court, this is specifically provided for by Article 69, paragraph 1, of the Rules of Court, provided the State cited has taken no step in the proceedings.⁴ The principle involved is exactly the same as in the case of a standing declaration under Article 36, paragraph 2, of the Statute ('Optional Clause' jurisdiction), accepting the jurisdiction of the Court either for the purposes of a particular dispute or for a class of disputes. This may be withdrawn or altered at any time prior to another State seising the Court on the strength of that declaration—or the declaration may expire before that date, equally with the effect of

¹ For further discussion of the use of this term, see section (II) (3) (d) (i) and (ii) below.

² Considered in section (II) below.

³ This matter is further considered in section (III) (2) (a) below.

⁴ Discontinuance of cases in which *both* parties have taken a step in the proceedings, whether the discontinuance is by mutual agreement or at the request of the applicant party, raises considerations of a different order and, in the case of the International Court, is governed by Articles 68 and 69, paragraph 2, of the Rules of Court.

depriving the Court of jurisdiction. Thus in the *Nottebohm* case (I.C.J., 1953, 122) the Court said:

‘... the lapse of a Declaration by reason of expiry, *before the filing of the Application*, of the period fixed therein makes it impossible to invoke that Declaration in order to seise the Court’ [italics added].

And again (*ibid.*, 131):

‘There can be no doubt that an Application filed after the expiry of this period [i.e. of the duration of the Declaration of acceptance] would not have the effect of legally seising the Court.’

Exactly the same principle would apply in the case of two States bound by a treaty providing for a reference to arbitration, or to the Court, of disputes arising under it, if a valid notice of denunciation or withdrawal had been given by one of the parties, and the period of the notice had expired before the arbitral tribunal (or the Court) had been seised of any dispute, by whatever were the appropriate steps.¹ The case is quite different where an ‘offer’ to refer a given dispute or class of disputes to arbitration or to the Court has definitely been ‘accepted’ in due form. This may occur in various ways. The ‘offer’ may take the form of a unilateral application, in a particular case, to a tribunal such as the Court, and may be accepted by the State cited, either in terms, or tacitly by taking a step in the proceedings or by other act evidencing acceptance of, or submission to, the jurisdiction. Or the ‘offer’ may consist of a standing declaration of willingness to refer a given dispute or class of disputes to arbitration or adjudication, in which case it may be accepted by means of an application to the tribunal concerned, or by other appropriate notice.² Or the case may be one not so much of an offer, as of an obligation resulting from a treaty clause providing for the arbitration or adjudication of disputes, the obligation being brought into play by means of an application to the tribunal, or by other appropriate step, on the part of the other party to the dispute. In all these cases the ‘offer’ cannot, so far as the particular case goes,³ be withdrawn once it has been ‘accepted’ in the appropriate way; nor, when it is a case of a treaty obligation,

¹ In the nature of the case, the whole of this matter arises mainly with reference to standing tribunals such as the Court, or tribunals set up under particular treaties, or to institutional tribunals belonging to international organs or organizations.

² If, however, the proceedings are before the International Court, it goes without saying that, on account of the reciprocity requirement, the applicant State must itself have accepted the Court’s compulsory jurisdiction by an appropriate declaration under the ‘optional clause’, even if confined to the particular case.

³ Naturally, any withdrawal of a standing acceptance of the jurisdiction, or notice of withdrawal from a treaty containing an arbitration clause, while not affecting disputes already submitted to the tribunal, would affect any future disputes, or existing ones not yet so submitted. (The case where the *dispute* arose prior to the termination of the treaty obligation, but before any reference of it to the treaty tribunal, which was partially involved in the *Ambatielos* claim, is considered in paragraph (c) below.)

can any notice terminating the general treaty obligation affect proceedings already instituted. Thus, if the jurisdiction of a tribunal is invoked by a unilateral application to it, capable, if followed by a suitable response on the part of the defendant State, of creating competence by *forum prorogatum*, the application may be withdrawn at any time up to the point when the other party signifies its acceptance of, or submission to, the jurisdiction; but not after. Again, a standing declaration may be terminated, cancelled, expire, or not be renewed; but this cannot affect proceedings already commenced in virtue of it. The same, as already stated, applies in the case of the termination of any treaty, or of any notices of termination or withdrawal given under it. These seem to be obvious and indeed elementary conclusions, yet they were seriously questioned in the *Nottebohm* case (Jurisdiction) when Guatemala contended that the expiry of its Optional Clause declaration *after* proceedings had been instituted before the Court by Liechtenstein, by means of a unilateral application involving Guatemala's declaration, deprived the Court of jurisdiction as from the expiry of the declaration—and, as the Court put it (*I.C.J.*, 1953, 121),

'since Guatemala had accepted the jurisdiction of the Court for a period ending on January 26th, 1952, the Court, after that date, no longer had the power of administering justice with reference to Guatemala.'

In this case, Guatemala had accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, on 27 January, 1947 for a period of five years—due therefore to expire on 26 January, 1952. A little over a month earlier, on 17 December, 1951, Liechtenstein (also a party to the Court's compulsory jurisdiction) filed an application against Guatemala in the *Nottebohm* case. The Guatemalan contention, therefore, was that while the Court might have had jurisdiction at the inception of the proceedings, it ceased to have it as from the moment of the expiry of Guatemala's standing acceptance of the Court's compulsory jurisdiction. This, it will be seen, amounted in effect to a contention that the acceptance (whether *ad hoc* or standing) necessary to found the Court's jurisdiction, must not only exist at the moment when the Court is first seised of the dispute, but must continue to subsist throughout the proceedings and, strictly, right up to the date of judgment. The Court, which rightly characterized the Guatemalan contention as a 'new interpretation of the effect attaching to [a] limited period' of acceptance of the Court's compulsory jurisdiction, rejected it in the following terms (*I.C.J.*, 1953, 122-3):

'At the time when the Application was filed, the Declarations of Guatemala and of Liechtenstein were both in force. The regularity of the seising of the Court by this Application has not been disputed. The subsequent lapse of the Declaration of Guatemala, by reason of the expiry of the period for which it was subscribed, cannot invalidate the Application if the latter was regular: consequently, the lapse of the

Declaration cannot deprive the Court of the jurisdiction which resulted from the combined application of Article 36 of the Statute and the two Declarations. . . .

'An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established.'

The effect of this is that, in the absence of any special considerations indicative of the contrary,¹ the critical date with reference to which the jurisdiction of the Court (or indeed of any international tribunal) has to be determined, is the date of effective seizure, in the sense that if the tribunal has jurisdiction on that date, this cannot be affected by what happens thereafter, or by subsequent events or the subsequent acts of the parties.² The converse is not necessarily true, as has been seen, for the principle of *forum prorogatum* may enable a jurisdiction incomplete at the date of seizure, to be perfected by a subsequent acceptance of, or submission to, the jurisdiction. This enables the position to be generalized in the following rule, namely, that once the jurisdiction of the Court or other tribunal exists in relation to a given dispute, *and* the Court or tribunal is actually and validly seised of the dispute, subsequent events or the subsequent acts of the parties cannot affect the jurisdiction. The practical reasons for such a rule are obvious. Without it, any professed acceptance of the jurisdiction of the Court, or other tribunal, or of any arbitral obligation arising under a treaty, could be nullified in most cases. So far as the Court is concerned, a number of the acceptances of its compulsory jurisdiction are not made even for fixed periods, but can be withdrawn or amended at any time. The potentially deleterious effects on the Court's compulsory jurisdiction of this position have been pointed out by Professor Waldock in a recent article;³ but at least they only relate to cases not yet brought. If cases already before the Court could also be affected, there would be little left of the compulsory jurisdiction. Equally, where a fixed period is specified in the relevant declaration, it does not normally exceed five years, or occasionally ten; and in view of the length of proceedings before the Court, the chances of its happening to run out at some point before judgment was rendered would always be considerable—though if pleadings had been interchanged it might

¹ The Court itself seemed to point to such a possibility when it said (*I.C.J.*, 1953, 121) that at the time when Guatemala made its declaration accepting the Court's compulsory jurisdiction 'neither in its declaration nor in any other way did Guatemala then indicate that the time-limit provided for in its declaration meant that the expiry of the period would deprive the Court of jurisdiction to deal with cases of which it had been previously seised'. It may, however, be doubted how far a State could be said to be accepting the compulsory jurisdiction at all, in any true sense, if its acceptance were made subject to a rider which would enable the Court to be deprived of jurisdiction even after it had been seised of a case on the basis of this acceptance.

² A subsequent *settlement* of the dispute, or discontinuance of the proceedings by the plaintiff State (see n. 4, p. 15, above), involves different considerations. Such action has no relevance to the basic *jurisdiction* of the Court. It merely 'de-seises' the Court of the particular case.

³ 'The Decline of the Optional Clause', in this *Year Book*, 32 (1955-6), p. 244, at pp. 265 et seq.

be argued that a new acceptance *ad hoc* for the purposes of the case had impliedly been given.

(c) *Effect of treaty termination on the obligation to refer to the treaty tribunal disputes about claims already arisen prior to termination, but not then so referred.* It has been seen that when a dispute under a treaty has already been referred to the treaty tribunal, the subsequent termination of the treaty, or withdrawal from it of one of the parties, coming as it does after the tribunal is seised of the dispute, cannot affect the jurisdiction of the tribunal or the obligation of the parties to submit to it. What is the position if, although the dispute has not been referred to the tribunal prior to the termination of, or withdrawal from, the treaty, the claim which is the subject of the dispute had arisen before that date? Could it be argued by the claimant State that because the treaty *was* in force when the claim arose, the obligation to refer it to the treaty tribunal still subsists? On the analogy of the position which obtains where the parties have accepted the compulsory jurisdiction of the International Court by an Optional Clause declaration, the answer to this question would be in the negative. A State may be obliged under its Optional Clause declaration to have recourse to the Court in respect of a certain dispute, but, as has been seen above, and as the Court expressly stated in the *Nottebohm* case,¹ if that State terminates its acceptance of the Court's jurisdiction, or if that acceptance expires, *before* any application to the Court is made by the other party, the Court will have no jurisdiction in the case. The Court, however, is a standing tribunal, to which a unilateral application (with the effect of seising it once and for all) can be made by any party which has accepted its compulsory jurisdiction. Thus the matter resolves itself into a question of getting the application in in time. The position is not quite the same, and is not so simple, where, as will often be the case with a treaty obligation to arbitrate, the treaty tribunal has itself to be *constituted* by the action of the parties in appointing their arbitrators, agreeing on neutral arbitrators, &c.² It may then well occur that a *request* for the reference of the case to a treaty tribunal is made by the claimant party while the treaty is still binding on both parties, but the request is either refused, or not answered, or is subjected to various delays by the defendant party, who in the meantime denounces or withdraws from the treaty, or it expires.³ In such a case, there would seem to be at least strong

¹ See paragraph (b) above.

² This is not always the case under a treaty. A considerable number provide for references to standing tribunals such as the International Court.

³ It is assumed for present purposes that the denunciation is valid—i.e. that the treaty is terminable after a certain period, or upon the expiry of a certain notice, or is otherwise terminable by unilateral action—or, in the case of multilateral treaties, that a right of withdrawal for individual parties exists. As to this, see the present writer's 'Second Report on the Law of Treaties' for the International Law Commission of the United Nations, published in the *Yearbook of the Commission for 1957*, vol. ii, pp. 16-70.

equitable grounds for holding that not only does the claim subsist (because it arose while the parties were both still bound by the treaty), but that so also does the obligation¹ to refer it to the treaty tribunal. In the *Ambatielos* case precisely this point would, or might have, arisen but for the fact that the parties had taken express steps to provide for it. An Anglo-Greek Commercial Treaty of 1886 contained (or rather had attached to it) a provision for the reference of disputes about claims arising under the Treaty, to an arbitral Commission to be constituted *ad hoc* by the parties (i.e. if and when there was a dispute). Upon the termination of this Treaty, and its replacement by a new one, the parties entered into a special joint Declaration keeping alive (i) claims having already arisen and 'based on' the old Treaty, and (ii) the obligation to refer any disputes about such claims to an arbitral Commission, as had been provided under that Treaty. The actual dispute that came before the Court was not, and in view of (ii) above, scarcely could be, whether the obligation to refer such claims to an arbitral Commission still subsisted: it was whether the particular claim arising in the case was in fact of the requisite kind—i.e. whether or not it was a claim 'based on' the Treaty, and also whether the Court had jurisdiction to decide that question.² Because of the existence of the joint Declaration, the Court did not have to decide whether, in its absence, there would none the less have been an obligation, even after the termination of the Treaty of 1886, to arbitrate disputes about claims having arisen while it was still in force. Nevertheless, certain pronouncements touching on the matter were made. Lord McNair, in particular, dealt expressly with the point. Distinguishing carefully between the two main parts of the relevant joint Declaration, as (a) keeping alive the treaty *claims*, and (b) keeping alive the obligation to refer disputes about such claims to the treaty procedure for their settlement, he said (*I.C.J.*, 1952, 63–64):

"The Declaration is evidently an elliptical document and seems to be due to the desire of both Parties that the expiry of the Treaty of 1886, then imminent, should not adversely affect claims "based" upon it, and the procedure of arbitration provided therein for them. I do not see how the provisions of the Treaty of 1926 could prejudice claims "based" on the Treaty of 1886 because, in my opinion, such claims acquire an existence independent of the treaty whose breach gave rise to them. Neither the expiry of the Treaty of 1886, nor the entry into force of the Treaty of 1926, could affect the survival and validity of claims "based" on a breach of the Treaty of 1886 which had already occurred. In other words, I consider that the first sentence of the Declaration was, however prudent, strictly speaking unnecessary and was inserted *ex abundanti cautela*. On the other hand, the second sentence of the Declaration, that is, the sentence

¹ It naturally makes no difference to the continued existence of the obligation that in many cases the lack of a standing tribunal, and the necessity for the co-operation of both parties in setting up the treaty tribunal, make it impossible for the claimant State to enforce the obligation by unilateral *application*.

² These aspects of the case are fully discussed in sections (II). (3) and (III) (3) (c) (ii) below.

dealing with the arbitral procedure, was necessary to preserve that procedure, because it would otherwise lapse upon the expiry of the Treaty of 1886. What made the first sentence of the Declaration prudent, and the second sentence of the Declaration necessary, was not the Treaty of 1926 but the imminent expiry of the Treaty of 1886, which took effect on 28th July, 1926, by reason of its denunciation by the Hellenic Government. The Declaration does not touch or concern anything contained in the Treaty of 1926 but regulates something external and collateral to it.'

From this, it is clear that, whereas claims having already arisen under a treaty while it was still in force remain, as a matter of general law, unaffected by its termination, irrespective of whether the parties do or do not make special provision for keeping them alive,¹ this, in Lord McNair's view, is not the case as regards the particular treaty machinery for their settlement. If this is to be kept alive as an obligatory method of settlement, or if another is to be substituted for it, a further express agreement by the parties is necessary. Thus, despite the considerations of equity mentioned above, the position in this kind of case would seem to be exactly the same as when an optional clause declaration is terminated or expires after a dispute covered by it has arisen, but before that dispute has been referred to the Court by an appropriate application. The Court itself did not have to deal directly with this matter in the *Ambatielos* case because, as already explained, the existence of the joint Anglo-Greek Declaration prevented it from arising as such. The Court did, however, make the following observation (*I.C.J.*, 1952, 44):

'The intention of the Declaration was to prevent the new Treaty² from coming into full force in this sweeping manner and thus prejudicing claims based on the older Treaty or the remedies provided for them.'

From this, it would seem that the Court thought that, without the Declaration, there would—at any rate in the particular circumstances of the replacement by the parties of the old Treaty of 1886 by a new one—have been some doubt whether even the *claims* already arisen under the old one would have remained alive—and *a fortiori* that the 1886 Treaty machinery for the settlement of disputes concerning them would not subsist. Other questions raised by the existence of an obligation to refer disputes to a tribunal *yet to be constituted*, and by the action of the parties themselves, which were prominent in the *Ambatielos* case, are dealt with in a later section.

(5) *Jurisdiction and the propriety of exercising it*

The fact that an international tribunal has jurisdiction in a given case, does not mean that it will necessarily be bound to, or will, exercise it. The

¹ However, the quotation from the Judgment of the Court given below, and its decision in the first phase of the *Ambatielos* case, show that in certain circumstances there may be a query, unless the parties do make special provision for the matter.

² The new Treaty did not simply expire, but was replaced by a new one, the language of which the Court thought might be regarded as having put an end even to claims already vested under the old Treaty. As to this, see the author's article in this *Year Book*, 33 (1957), pp. 262-6.

question of the propriety of its doing so in particular circumstances may enter in, and the tribunal may in certain cases feel that it ought to decline to exercise its jurisdiction. This is a matter which arises chiefly in connexion with advisory opinions,¹ but it can also arise in contentious cases, and will be discussed in that connexion in a later article, in the series covering the cases occurring in the period 1954-7, when the point arose in the *Monetary Gold* case.² However, although not pronounced upon by the Court itself in the period now under review, it was, in effect, raised in the *Ambatielos* case by Judges delivering separate or dissenting opinions; and since an important point of principle was involved, it is discussed later in the present article.³

(6) *Jurisdiction and 'merits'*

Several pronouncements were made during the period under review respecting different aspects of the relationship between 'jurisdiction' and 'merits'.⁴

(a) *Terminology*—*What are the 'merits' of a case?* A definition of the term 'merits' of a dispute was given by Judge Read in the *Anglo-Iranian Oil* case (Jurisdiction) in the following terms (*I.C.J.*, 1952, 148):

'To my mind, the merits of a dispute consist of the issues of fact and law which give rise to a cause of action, and which an applicant State must establish in order to be entitled to the relief claimed. [Thus] In every dispute which is founded upon the breach of a treaty obligation, the applicant must establish the existence and scope of the treaty, as well as the facts which constitute the breach, in order to justify the tribunal in according the relief . . . requested.'

There are nevertheless certain refinements and ambiguities in the concept of what constitutes the 'merits' of a dispute which ought to be noticed:

(i) A more complete definition might be to the effect that the merits of a dispute consist of all those propositions of fact and of law which must be established by a party in order to enable it to obtain a judgment in its favour, on the assumption that the tribunal has jurisdiction to entertain these propositions, and that there is no objection to the substantive admissibility of the claim—or alternatively, that the merits consist of all those issues of law and of fact which (on the same assumptions) the tribunal must consider and pronounce upon in order to render a final decision. However, as has been seen,⁵ questions of admissibility may have a certain relationship

¹ See as to this, the corresponding article in the previous cycle of this series, this *Year Book*, 29 (1952), pp. 50-53; and also § 3 below, subsections (ii)-(iv) on pp. 143-7.

² *I.C.J.*, 1954.

³ See section (II) (3) below, especially subsection (a) (ii); and also section (III) (3).

⁴ And see also for other aspects of the matter section (3) above.

⁵ Section (3) above, and n. 6, p. 12.

with the ultimate merits, and although the Court has itself on occasion distinguished not only between jurisdiction and admissibility, but also between admissibility and merits,¹ it is by no means certain that the definition given by Judge Read would not cover questions of substantive admissibility as well as questions of ultimate merits.

(ii) Where one jurisdictional issue leads to another, and the first jurisdictional issue is whether the tribunal has jurisdiction to determine the second, then the second issue might, in relation to the first, be said to constitute the 'merits' of the case. This is what occurred in the *Ambatielos* case. In the first phase of the case, the Court had to determine whether it had jurisdiction to go into and pronounce on the 'arbitrability' of a certain dispute, i.e. whether, under a certain arbitral instrument, an obligation existed to refer this particular dispute to a Commission of Arbitration to be set up. Having decided, in the first phase of the case, that it had jurisdiction to consider the question of arbitrability, the Court then went on, in the second phase, to consider and pronounce on it. In relation to these two particular sets of proceedings, taken as a whole, it is clear that this second phase, though it dealt with a jurisdictional issue, constituted the 'merits' of the case, because it did not deal with the jurisdiction of the Court itself, this having already been decided in the first phase (which was accordingly, strictly and solely jurisdictional). Neither phase of course dealt with the *ultimate* merits. The Court having decided in the second phase that the dispute was arbitrable,² and must be referred to a Commission of Arbitration under the relevant treaty instrument, the ultimate merits were then eventually determined in a third phase before such a Commission.³ Because of the ambiguities involved, Professor Verzijl, in an article⁴ on the *Ambatielos* case to which further reference is made later, said that since there were 'two kinds of merits involved in this case, which is very confusing, I intend to distinguish them by writing "*merits*" where Great Britain's obligation to arbitrate is at stake, and *merits* where allusion is made to the validity of the claim of Mr. Ambatielos'. Clearly there is room for greater certainty of terminology, both here, and as regards the point dealt with in sub-paragraph (i) above.

(b) *The duty of a tribunal considering jurisdiction not to trespass on merits.* In the *Ambatielos* case the Court repeatedly and emphatically stressed the fact that a tribunal, when deciding on questions of competence, must not impinge upon the sphere of the merits. It is true that in this case the Court

¹ See, for example, the passage from the Judgment in the *Nottebohm* case quoted on p. 14, above.

² There is, however, an important point involved as to what exactly the Court decided when it decided the dispute was 'arbitrable'. This is discussed later—see generally, section (II) (3) below.

³ See section (3) and n. 1, p. 14, above.

⁴ See in *Nederlands tijdschrift voor internationaal recht* for October 1953, p. 58, at p. 60, n. 1.

was not dealing with its own jurisdiction¹, but with that of another tribunal. The same principle, however, applies *a fortiori* when a tribunal is dealing with its own jurisdiction. If a tribunal then should decide that it is incompetent, and should have made any pronouncement on the merits, it will have done precisely what it has found itself to be without jurisdiction to do. Even though such a pronouncement can have no operative force, it may be gravely embarrassing both to the tribunal and to the parties. In the second phase of the *Ambatielos* case, the Court said (*I.C.J.*, 1953, 16):

'The Court must refrain from pronouncing final judgment upon any question of fact or law falling within "the merits of the difference" or "the validity of the claim". If the Court were to undertake to decide such questions, it would encroach upon the jurisdiction of the Commission of Arbitration.'

And again (*ibid.*, 16-17):

'The Court cannot substitute itself for the Commission of Arbitration. . . . To decide on whether the facts alleged . . . if true, would constitute an actual violation of the Treaty . . . would be to pass upon "the validity of the claim" and "the merits of the difference", which are reserved exclusively for the Commission of Arbitration, and concerning which this Court . . . is without jurisdiction.'

However, the fact that a tribunal, when considering jurisdiction, may not pronounce upon or determine questions appertaining to the merits, does not of course mean that it cannot hear or consider these where it is essential to do so for the determination of the jurisdictional issue. This is because, not infrequently, jurisdictional issues take a form which makes it very difficult to consider them in isolation from the merits,² so that 'if in such cases the [tribunal] declines jurisdiction there is the danger that it may have done so by reference to pleadings which lack completeness'; while if 'it declares itself competent it may do so in reliance upon a reasoning which prejudices some of the aspects of the case upon the merits'.³ Nevertheless, even in those cases where, because of such a situation, the tribunal orders the jurisdictional issue to be joined to the merits, so that full argument by the parties is heard on the merits as well as on the jurisdictional issue, the tribunal must, unless its finding is in favour of jurisdiction, avoid giving any decision on, or even expressing any opinion about, the merits.

(c) *Joinder of the jurisdictional issue to the merits.* The kind of situation

¹ That is, except in so far as, in the first phase of the case, it had decided that it had itself no jurisdiction to determine the merits, but only to determine whether there should be a reference to another tribunal—see section (II) (3) below, *passim*.

² Any case involving the issue of 'domestic jurisdiction' or the reserved domain affords a good illustration of this. The *Nottebohm* case, on the other hand, is a good example of one where the jurisdictional issue was completely divorced from the merits, without the slightest connexion between the two.

³ Lauterpacht, *op. cit.* in n. 4, p. 10, above, at p. 113.

which may call for this has already been described in the immediately preceding paragraph. Just as the ordering of a joinder results from the feeling that in the given case 'the interests of the good administration of justice require it',¹ so equally does the refusal or failure to do so reflect the view that a tribunal, in dealing with a jurisdictional issue, should, whenever possible, avoid all contact with the merits. Thus, in the first phase of the *Ambatielos* case, Judge Levi Carneiro said (*I.C.J.*, 1952, 48):

'I consider that . . . a joinder should only be made when it is absolutely necessary.'

On the other hand, Judge Read in the *Anglo-Iranian Oil* case² drew attention to the dangers which would arise if the Court were to decide 'in preliminary proceedings, issues of law or fact which are essential elements of both jurisdiction and merits, or which are inextricably linked with the merits of the case', and to the practice of the former Permanent Court of refusing in such proceedings 'to deal . . . with questions of jurisdiction which concerned or were closely related to issues of law or of fact that formed part of the merits'. Accordingly he thought that it was

'impossible to overlook the grave injustice which would be done to an applicant State, by a judgment upholding an objection to the jurisdiction and refusing to permit adjudication on the merits, and which, at the same time, decided an important issue of fact or law, forming part of the merits, against the applicant State. The effect of refusal to permit adjudication of the dispute would be to remit the applicant and respondent States to other measures, legal or political, for the settlement of the dispute. Neither the applicant nor the respondent should be prejudiced, in seeking an alternative solution of the dispute, by the decision of any issue of fact or law that pertains to the merits.'

And he concluded³:

'Accordingly, I am compelled to conclude that the aspect of this Objection which relates to the existence and scope of the alleged international agreement should be joined to the merits.'

These passages bring out the rather paradoxical fact that both a joinder, and a refusal of it, may be inspired by basically the same sort of motive—in the one case not to prejudge issues of merits before these have been fully heard; and in the other not to prejudge issues of merits which may never arise at all, or need to be heard.

(II) THE INHERENT POWER OF INTERNATIONAL TRIBUNALS TO DETERMINE THEIR OWN COMPETENCE

(1) *The general principle considered*

International tribunals possess inherent power to determine their own competence. This power (sometimes called the *compétence de la compétence*)

¹ *Dictum* of the Permanent Court in the *Panevezys-Saldutiskis Railway* case, Series A/B, No. 75, p. 56.

² *I.C.J.*, 1952, 149.

³ *Ibid.*, 150.

is usually exercised at the instance of one of the parties disputing the tribunal's jurisdiction or competence. It may however also be exercised by the tribunal acting *proprio motu*.

(a) *The Court's formulation of the principle.* Such a formulation had already been given in the first phase of the *Peace Treaties* case,¹ when the Court affirmed the principle as being, in effect, a general principle applicable to all international tribunals. This principle received a striking reaffirmation in the *Nottebohm* case (Jurisdiction), when the Court said (*I.C.J.*, 1953, 119):

'Paragraph 6 of Article 36 [of the Statute]² merely adopted in respect of the Court, a rule consistently accepted by general international law in the matter of international arbitration. Since the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction. This principle was expressly recognized in Articles 48 and 73 of the Hague Conventions of July 29th, 1899, and October 18th, 1907, for the Pacific Settlement of International Disputes, to which Guatemala became a Party. The Rapporteur of the Convention of 1899 had emphasized the necessity of this principle, presented by him as being "of the very essence of the arbitral function and one of the inherent requirements for the exercise of this function". This principle has been frequently applied and at times expressly stated.'

This passage is interesting because it implies that the principle of the *compétence de la compétence*, which today seems so inevitable, was formerly by no means universally admitted,³ and can perhaps only be regarded as finally settled since the case of the *Alabama*.⁴ There are at least two grounds upon which it can, not implausibly, be suggested that the soundness of this principle is questionable:

(i) First, since an international tribunal can be regarded, not unreasonably, as having a certain interest in the question of the character and extent of its jurisdiction, its power to determine any question relating to it, places it in some sense in the position of being judge in its own cause. The corresponding power of domestic tribunals affords no real analogy, not only because of the different character of most jurisdictional issues before domestic tribunals⁵—to which attention has already been drawn—but also

¹ See this *Year Book*, 29 (1952), p. 55.

² Which provides that 'In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.'

³ See, for instance, the doubts expressed by some of the commissioners in the case of the *Betsey*, 1796 (one of the earliest cases heard under the Jay Treaty of 1794 between Great Britain and the United States), as described in Moore's *International Adjudications*, New Series, vol. iv, p. 82.

⁴ The method of 'settlement' was somewhat oblique—see the account in Rosenne, *op. cit.* in n. 2, p. 8, above, at pp. 339–40.

⁵ Historically, however, *conflicts* and competitions of jurisdiction such as those which occurred in England up to the great law reforms of the nineteenth century, between the Courts of Ex-

because, in the first place, such questions are, in the domestic forum, determined in accordance with definite rules provided by the law, rather than on the basis of an interpretation and evaluation of the parties' consents and agreements¹; and, in the second place, because the jurisdictional, no less than the substantive, decisions of a domestic tribunal will normally be—or can, if the legislature so wishes, be made to be—subject to appeal to a higher court, so that in the case of all but the highest courts, whose jurisdiction is seldom called in question,² the domestic tribunal is not in the last resort the final arbiter of its own jurisdiction. The international tribunal, on the other hand, necessarily is, because of the absence of any organized hierarchy of such tribunals, or of any system of appeals, other than such as the parties may themselves agree upon and provide for. Nor, in the absence of such agreement or provision, can even the International Court determine any jurisdiction but its own.³ It has no *inherent* power to determine the jurisdiction of other international tribunals.

(ii) Secondly, it can be urged that the power of the tribunal to determine any questions of jurisdiction, whether raised by one of the parties or by the tribunal *proprio motu*, is scarcely consistent with the fundamental principle that the jurisdiction of an international tribunal is derived from and depends on the will of the parties; for if the tribunal determines a jurisdictional issue itself, it will in most cases⁴ do so contrary to the expressed views and wishes of at least one, and possibly both,⁵ of the parties. Consequently, on this view, if a jurisdictional question arises, it is for the parties to settle it,

chequer, Common Pleas and King's Bench, and of all of these with the Courts of the Admiral and of the Chancellor, afford a very good example of the potential dangers of tribunals determining their own jurisdiction. In England, it led to the growth of a procedural jungle which only extensive reform could clear away.

¹ See section (I) (2) (a) above.

² Except, of course, where the possibility of an appeal, whether on a jurisdictional or a substantive point, depends on whether an appeal to a higher tribunal lies, and this question is in the last resort one to be settled by the potential appellate tribunal itself.

³ In the *Ambatielos* case (see further generally, subsection (3) below) the Court did in a certain sense determine that another tribunal had jurisdiction to decide a given case; but it derived its power to do this from its own previous decision that the parties had by implication agreed to its doing so, because they had made the arbitral provision on the interpretation of which the matter depended, part of a treaty which contained a clause specifying that any dispute as to the interpretation or application of the treaty should be settled by the Court. Similarly, by way of its advisory jurisdiction, which of course rests on the consent given by member States to the Charter of the United Nations, the Court may be called upon to express views as to what would in effect be the jurisdiction of another tribunal (see the *Peace Treaties* case and the remarks made in § 3, subsections (i)–(iv) below).

⁴ When the tribunal takes a jurisdictional point *proprio motu* (see subsection (b) below) it is not impossible that its decision may be in accordance with the views of *both* parties.

⁵ This may occur in circumstances similar to those described in the preceding note, if the tribunal takes a jurisdictional point *proprio motu*. For instance, if the tribunal considers that its jurisdiction is derived from a certain treaty but that the particular case does not belong to the class covered by the treaty, it may—at any rate if the treaty is a multilateral one—feel obliged to decline jurisdiction, even though neither party objects to its being exercised. In such an event, the tribunal might only feel able to assume jurisdiction on the basis of a special agreement between the parties outside the treaty, referring the case to it *ad hoc* and not as a treaty case.

and unless they have *expressly* conferred on the tribunal the power to determine jurisdictional questions, it ought to be referred back to them for discussion through the diplomatic channel.

Conclusion. It is clear that despite the theoretical force of the foregoing considerations, the acceptance of the view which they support would go far to render international arbitration and adjudication impossible, even in those cases in which the parties appeared, ostensibly, to have agreed to have recourse to it—given the proneness of governments already referred to (see section (I) (2) above), to take jurisdictional objections whenever it is open to them to do so. In the absence of any hierarchical system, or of special agreement, there is no other method by which any judicial determination of jurisdictional issues—which are after all legal issues—can be obtained, if not from the tribunal itself. To leave such a question to be settled directly between the parties would not only be to abandon any judicial determination of it.¹ The matter may therefore be left to rest on the opinion expressed by Lord Loughborough as Lord Chancellor, with reference to the powers of the Commissioners under the Jay Treaty, in the case of the *Betsey*,² as described in Moore³:

‘On its being suggested that the same embarrassments as had already occurred might arise in the future, if upon every objection to the competency of the commissioners a reference must be made to the respective governments for their instructions instead of such questions being decided by the commissioners themselves, the Lord Chancellor said “that the doubt respecting the authority of the commissioners to settle their own jurisdiction, was absurd; and that they must necessarily decide upon cases being within, or without, their competency”.’

(b) *Jurisdiction not solely a question for the parties—action by the tribunal ‘proprio motu’.* It is generally accepted that an international tribunal ought not to give a decision in a case unless it is satisfied that the dispute is within its competence. This necessarily involves that the tribunal may raise any question of jurisdiction *proprio motu*, irrespective of whether the parties do so, and even if neither party disputes the jurisdiction.⁴ Expression is

¹ It cannot be assumed that the outcome of the parties’ deliberations would be a specific agreement that the tribunal—or even some other tribunal—should deal with the matter.

² See n. 3, p. 26, above.

³ *International Adjudications*, New Series, vol. iv, p. 85.

⁴ No doubt such cases will be rare. An international tribunal may equally, *proprio motu*, take points as to the propriety of its exercising its jurisdiction, even where it has it, and the cases in which this occurs may be relatively frequent. In effect the issue of propriety was raised *proprio motu* by some of the dissenting Judges in the *Ambatielos* case (see section (II) (3) (a) (ii) below). In the same case, a point of propriety, though a different one, was raised by the United Kingdom; but the Court rejected the contention. This was to the effect that the Court ought to decline jurisdiction, and decline to find that the case ought to be referred to arbitration, because the claimant Government could at any time in the previous twenty-five years have put forward the case on the same basis, and have seised the Court or its predecessor the Permanent Court, and that its failure to do so had seriously prejudiced the defence. This was, of course, also an allegation of undue delay, but the element of propriety was involved.

indirectly given to this principle in Article 53 of the Statute which, after providing that if in any proceedings one of the parties does not appear, or fails to defend its case, the Court may decide in favour of the other, then goes on to say that 'the Court must, before doing so, satisfy itself . . . that it has jurisdiction in accordance with Articles 36 and 37 . . .'. The present Court has not yet had occasion to raise any jurisdictional point *proprio motu*,¹ but in the *Anglo-Iranian Oil* case, Lord McNair stated the principle as follows (*I.C.J.*, 1952, 116):

'An international tribunal cannot regard a question of jurisdiction solely as a question *inter partes*. That aspect does not exhaust the matter. The Court itself, acting *proprio motu*, must be satisfied that any State which is brought before it . . . has consented to the jurisdiction. This aspect of the matter was mentioned in the Judgment of the Permanent Court in 1927 in the *Chorzow Factory* case (Jurisdiction), Series A, No. 9, p. 32. . . .'

However, Rosenne² suggests that while this is unquestionably the position, such cases will be relatively rare, and that, viewed 'against the wider background of the theory and practice governing the jurisdiction of international tribunals . . . it will be quite exceptional for the Court to raise this type of question *proprio motu* and in face of a common intention of the parties to confer jurisdiction upon it . . .'. This means in effect that the Court will not be astute itself to query the common intention, if neither party denies it. Nevertheless, the question whether there is in fact such a common intention, constitutes always the essential, though not necessarily the only, jurisdictional element in every international case.

(2) *Application of the general principle to the International Court under Article 36, paragraph 6 of the Statute*

After stating the general principle as set out in subsection (1) (a) above, the Court went on to apply it to itself, with particular reference to the contention put forward by Guatemala in the *Nottebohm* case (Jurisdiction), that the powers of the Court under paragraph 6³ of Article 36 were, as the Court put it (*I.C.J.*, 1953, 119), 'limited to disputes concerning jurisdiction in respect of the application of paragraph 2⁴ of that Article [i.e. of Article 36],

¹ It was raised in this way more than once by the Permanent Court (see Rosenne, *op. cit.* in n. 2, p. 8, above, at pp. 359-60.

² *Op. cit.*, p. 360.

³ For text, see n. 2, p. 26, above.

⁴ This is the so-called 'optional clause' by which States parties to the Statute can accept the Court's compulsory jurisdiction in respect of disputes concerning:

- '(a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.'

and that it is therefore confined to disputes for the solution of which it is necessary to ascertain whether the claim falls within one of the categories enumerated under letters *a*, *b*, *c* and *d* of that paragraph'. The relevance of this was that 'the question which must be decided at this stage is not whether the claim of Liechtenstein falls within one of these categories, but rather whether the expiry¹ of the Declaration by which Guatemala accepted the compulsory jurisdiction of the Court has put an end to the Court's jurisdiction to deal with the claim of Liechtenstein.' The Court rejected this argument on two main grounds²:

(a) That no such limitation was implied by the actual terms of paragraph 6 of Article 36, which (*ibid.*) was

'... drafted in the broadest terms: there is nothing in it to indicate the restriction which the Government of Guatemala seeks to introduce by means of an interpretation.'

(b) That in any event, and irrespective of the language of paragraph 6, the general principle of international law giving international tribunals the power to determine their own jurisdiction would apply. The Court said (*ibid.*, 119-20):

'This principle, which is accepted by general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal constituted by virtue of a special agreement between the parties for the purpose of adjudicating on a particular dispute, but is an institution which has been pre-established by an international instrument defining its jurisdiction and regu-

¹ The expiry had, of course, taken place *after* the Court had been validly seised of the case by means of a unilateral application on the part of Liechtenstein, effected before the date of expiry, and while the Guatemalan Declaration was still operative (see section (I) (4) above).

² Sir Hersch Lauterpacht (*op. cit.* in n. 4, p. 10, above, at p. 349) lists the Guatemalan contention under the head of 'Unsubstantial Pleas to the Jurisdiction' as one of the cases illustrating the extreme care with which the Court treats jurisdictional questions, however slenderly based. His view (*ibid.*, p. 350) that 'Such care cannot properly be regarded as misplaced. In the international sphere the questions of jurisdiction call no less than the questions of substance for a full combination of administration of justice with the preservation of the requisite appearance that justice has been done'—may be compared with Rosenne's view (*op. cit.* in n. 2, p. 8, above, at p. 338) that jurisdictional questions 'should never be regarded as mere technical issues' (and see section (I) (i) above).

It is submitted that the particular contention advanced on behalf of Guatemala about the effect of paragraph 6 of Article 36 of the Statute was even more insubstantial than appears from the Court's decision, and that there were certainly two other grounds, besides those given by the Court, on which it might have been rejected, namely, (i) that any issue of jurisdiction, being, as the Court itself recognized in the last of the passages above quoted, a question of general international law, the jurisdictional issue raised by Guatemala did in fact come under head (b) of paragraph 2 of Article 36 ('any question of international law'); and (ii) that at the very least, paragraph 6 of Article 36 must relate not merely to paragraph 2 of the Article, but to the whole Article, including paragraph 1 which states (*inter alia*) that 'The jurisdiction of the Court comprises all cases which the parties refer to it. . . .' Hence, a dispute as to whether the parties *had* referred the case to the Court (it being in effect the Guatemalan contention that Guatemala had not, or had ceased to do so, because the Guatemalan optional clause Declaration had expired) was necessarily a dispute of a jurisdictional character coming under paragraph 1 of the Article, and therefore covered by paragraph 6 which provides that in case of any dispute about jurisdiction, the Court shall decide the matter.

lating its operation, and is, in the present case, the principal judicial organ of the United Nations.

'Consequently, the Court has not hesitated to adjudicate on the question of its own jurisdiction in cases in which the dispute which had arisen in this respect went beyond the interpretation and application of paragraph 2 of Article 36. In the *Corfu Channel* case (Judgment of April 9th, 1949, *I.C.J. Reports 1949*, pp. 23-26 and 36), the Court adjudicated on a dispute as to whether it had jurisdiction to assess the amount of compensation, a dispute which related to the interpretation of a Special Agreement; in the *Ambatielos* case (Judgment of July 1st, 1952, *I.C.J. Reports 1952*, p. 28), the Court adjudicated upon a dispute as to its jurisdiction which related to the interpretation of a jurisdictional clause embodied in a treaty; in both cases the dispute as to the Court's jurisdiction related to paragraph 1 and not to paragraph 2 of Article 36.

'Article 36, paragraph 6, suffices to invest the Court with power to adjudicate on its jurisdiction in the present case. But even if this were not the case, the Court, "whose function is to decide in accordance with international law such disputes as are submitted to it" (Article 38, paragraph 1, of the Statute), should follow in this connection what is laid down by general international law. The judicial character of the Court and the rule of general international law referred to above are sufficient to establish that the Court is competent to adjudicate on its own jurisdiction in the present case.'

These passages, taken in conjunction with the one quoted in sub-paragraph (a) of the present subsection, would appear to establish conclusively that the competence of the Court to determine its own jurisdiction is completely unfettered.¹

(3) *Application of the general principle to the case of the determination by one international tribunal, not of its own jurisdiction but, directly or indirectly, that of another*

How far is it consistent with the general principle above discussed, according to which all international tribunals are competent to determine their own jurisdiction, that such determination should be carried out (whether expressly or in effect) by another tribunal, even by the International Court itself, assuming the absence of at any rate any *specific* agreement between the parties to that end? In short, does the general principle entail not merely that all international tribunals *can*, but that they also *must* determine their own jurisdiction, in the sense that, in the absence of express agreement by the parties, no *other* tribunal than the one which, if competent, will also be entitled to hear the substance of the case, can

¹ This naturally applies simply to the question of determination. The Court's actual jurisdiction is itself circumscribed by the general principle of the consent of the parties as the basis of jurisdiction—(see section (III) below)—and by the treaties and other instruments, or acts, by which such consent is (or, as the case may be, is not) manifested. It may also, in practice, be circumscribed by considerations of 'propriety': the Court may not necessarily be obliged to exercise a given jurisdiction even if it considers it has it, and may feel in certain cases that it ought to decline to do so. This matter arises chiefly in regard to the giving of advisory opinions. That it can arise in contentious cases also, is shown by the *Monetary Gold* case, to be considered in the next cycle of articles on the cases occurring in the period 1954-7. See also the remarks made about the *Ambatielos* case in n. 4, p. 28, above.

determine the question of jurisdiction? These questions, during the period under review, came up in the first phase of the *Ambatielos* case. In that case,¹ the Court, being the tribunal set up² under an Anglo-Greek Commercial Treaty to deal with disputes concerning the 'provisions' of the Treaty, found that a joint Declaration made by the parties on the same day, containing an obligation to have recourse to a Commission of Arbitration in certain events, ranked as a 'provision' of the Treaty, and hence that the Court had jurisdiction to decide whether, in the given case, an obligation to have recourse to the Commission arose under this joint Declaration (this being disputed). The ensuing question of 'arbitrability', itself turned on whether, in the language of the Declaration concerned, the claim was 'based' on a certain other treaty. Consequently, a finding of the Court (such as it in fact gave) to the effect that there was an obligation to have recourse to a Commission of Arbitration, would normally be taken to imply³ the view that, in the opinion of the Court, the claim was 'based' on the Treaty concerned; and if so, this being the essential if not the sole test of the Commission's jurisdiction, it could be said to amount to a finding that the Commission had jurisdiction. There is, however, an ambiguity about the word 'based', to be noticed presently, and it has never been quite clear in what sense the Court regarded it, and therefore whether the Court really intended to (so to speak) take over the normal right of the Commission to determine the question of its own jurisdiction; or whether, on the other hand, it merely intended to indicate that the Commission must be set up, but without prejudging any question of the Commission's basic jurisdiction, which it would be for the Commission itself to decide, if need be. Doubts about the intention and effect of the Court's decision in this second phase of the *Ambatielos* case have been forcibly expressed by an authority whose views are entitled to great respect,⁴ and who stresses the importance of the

¹ The facts of this case are set out in greater detail, with reference to the questions of treaty interpretation that arose, in the article in this series that appeared in this *Year Book*, 33 (1957), pp. 255-70.

² The Treaty being dated 1926, the tribunal was originally the former Permanent Court, the present Court 'succeeding' to its jurisdiction under Article 37 of the Statute (see § 2 (V) below).

³ And was indeed expressed in terms, for in one of the concluding passages of the Judgment (*I.C.J.*, 1953, 22) the Court said that it 'must conclude that this is a case in which the Hellenic Government is presenting a claim on behalf of a private person "based on the provisions of the Anglo-Greek Commercial Treaty of 1886"'.

⁴ Professor Verzijl, who has for many years been a leading commentator on the Court in Dutch and other legal journals—see Bibliography in *Symbolae Verzijl* (Nijhoff, 1958), pp. 439-42.

Towards the end of its Judgment in the *first* phase of the case the Court appeared to have no doubt about the effect of what it would be doing in the second phase, if it then held that there was an obligation to submit the dispute to the Commission of arbitration. The relevant passage is as follows (*I.C.J.*, 1952, 44):

'It may seem at first sight that there is here a possibility of a conflict between a decision of the Court finding that there is an obligation to submit a difference to a Commission of Arbitration and an eventual decision by the Commission. There is in reality no such possibility.

'The Court would decide whether there is a difference between the Parties within the mean-

principle that the jurisdiction of an international tribunal is determinable by itself. He has no doubt that, in general, such a finding as that given by the Court in the *Ambatielos* case must have a jurisdictional character, for after referring to 'the unusual situation in which the Court finds itself when it is exceptionally called upon to decide whether an independent arbitral tribunal has jurisdiction to deal with a particular claim, or, in other words, whether the Contracting Parties are under an obligation to refer their difference to such an arbitral tribunal', he continues: 'These two formulations are in principle equivalent because no obligation to submit a controversy to an arbitral tribunal can exist when such a tribunal has no jurisdiction to deal with it.'¹ This is true, but perhaps it does not wholly dispose of the point, for it leaves open the question whether, in certain circumstances, there may not be an obligation to submit to the tribunal the very question whether or not it has jurisdiction to deal with the merits of the controversy.²

The foregoing considerations give rise to a number of queries which appeared in acute form in the *Ambatielos* case. These will be discussed under the following heads (a)-(d):

(a) In so far as the Court purported to tie the hands of the eventual

ing of the Declaration of 1926. Should the Court find that there is such a difference, the Commission of Arbitration would decide on the merits of the difference.'

From this, there would have seemed to be no doubt that in the Court's conception, it would, in the second phase of the case, be deciding all the *jurisdictional* issues and, if it decided them in the sense of affirming jurisdiction for the eventual Commission, it would then be for the Commission to decide all questions relating to the merits, including any question of the substantive admissibility of the claim (see the references to 'the *validity* of the claims involved'). However, when the actual Judgment in the second phase is studied, doubts arise as to what was really intended. The nature of these doubts can best be seen in the following passage from Verzijl (*loc. cit.*, pp. 72-73, quoted in n. 4, p. 23, above):

'An ambiguous passage in the judgment can be construed as implying that the Commission will still be competent to deny its jurisdiction to deal with the claim even after a judgment of the Court holding that it is duly "based" on the Treaty of 1886. What else can be meant by the following passage in the second judgment: "If the *Ambatielos* claim had been referred to arbitration, it would have been for the Commission to decide whether the claim had a legal basis in respect of the Treaty of 1886. In the absence of any manifestation of a common intention of the Parties to the contrary, the Commission of Arbitration cannot be deprived of a part of its competence and no other body can be invested with the authority to determine definitely the validity of the treaty basis of the *Ambatielos* claim." (p. 17). But how then could the Court in its first judgment deny any possibility of a conflict between its own finding and that of the Commission of Arbitration? If, on the other hand, the passage quoted above does not refer to the arbitrability of the claim, i.e. the pseudo-merits of the case before the Court, but only to the real merits of the *Ambatielos* claim, how then can the Court state here that the Commission of Arbitration cannot be deprived of a part of its competence? For if the Court's finding really prevails over the eventual finding of the Commission of Arbitration, then the latter has *ipso facto* been deprived of a part of its normal competence to judge its jurisdiction independently. The whole reasoning of the Court here is far from clear, the less so because in another ambiguous passage the Court expressly reserves to the authoritative decision of the Commission of Arbitration 'the genuineness of the treaty basis of any claim, if contested, together with any other questions relating to the merits of the claim'.

¹ *Loc. cit.* in n. 4, p. 23, above, at p. 75.

² This point is in effect considered by Professor Verzijl elsewhere in his article—see subsection (d) below.

Commission of Arbitration on the question of the Commission's jurisdiction, was this a correct exercise of the Court's powers, and if so on what basis?

- (b) Can the decision of the Court (and if possible should it) be regarded, not as intended to tie the hands of the Commission as to its jurisdiction, but simply as a decision that there must be recourse to a Commission of Arbitration, either party remaining free however, to place any relevant issue before the Commission, including the issue of its own substantive jurisdiction?
- (c) Assuming that the Court did intend to decide in a final manner on the issue of the Commission's jurisdiction, and only to leave to the Commission questions relating to substantive admissibility and ultimate merits, would it nevertheless have been open to the parties to raise jurisdictional issues before the Commission; and in any case, would the Commission itself have been free to raise them *proprio motu*, and to render a decision declining to exercise jurisdiction?¹
- (d) With respect to the general situation postulated by the foregoing queries, does the position differ according to whether the second tribunal involved (to whom it will fall to determine the merits, if jurisdiction exists) has or has not yet been constituted?

(a) *In so far as the Court purported to tie the hands of the eventual Commission of Arbitration on the question of the Commission's jurisdiction, was this a correct exercise of the Court's powers, and if so on what basis?*

(i) *Statement of the jurisdictional issue.* It is desirable to begin by stating exactly what the jurisdictional issue was, in so far as it affected or might have affected the competence of the Commission of Arbitration. The point is that had the case gone straight to an arbitral Commission in the first place, instead of going through its various phases before the International Court, the defendant party could, and presumably would, have taken exactly the same jurisdictional objection as it did before the Court in the second phase of the case. This was as follows. The Commission would (in the language of the relevant clause²) only be competent if the claim was 'based on the provisions of the Anglo-Greek Commercial Treaty of 1886'. The suggestion that it was so based, had however only been advanced at a late stage of a dispute that had gone on for nearly thirty years. The claim

¹ It should be explained that none of these things occurred, because the parties did not attempt to revive any jurisdictional issue before the Commission itself, nor did the Commission do so. But the point remains extremely pertinent.

² i.e. the joint Anglo-Greek Declaration of 16 July 1926 which, in the first phase of the case, the Court had found to rank as a provision of the Anglo-Greek Treaty of Commerce and Navigation signed the same day, so that by reason of the disputes article of that Treaty, the Court had jurisdiction to interpret the Declaration also, which it proceeded to do in the second phase of the case.

had originally, and for a long time, been maintained solely on the basis of the general rules of international law relating to the responsibility of States, denial of justice, and the treatment of foreigners. According to the contention of the defendant party (the United Kingdom) even a superficial examination of the claim showed that this was its true foundation, so that it was manifest that the alleged treaty basis had been put forward mainly, if not solely, for the express purpose of founding some kind of arbitral jurisdiction—this being essential from the Greek point of view, since Greece had not made any declaration accepting the compulsory jurisdiction of the Court, and hence could only bring the United Kingdom to arbitration if a treaty could be found containing a compulsory arbitration clause, and if it could be maintained that the United Kingdom acts complained of in the case, amounted to a breach of this treaty.¹ For this purpose, various articles of the 1886 Treaty were now cited, but, according to the United Kingdom contention, the alleged treaty basis of the claim was artificial, or contrived, and its real basis lay outside the Treaty in the general rules of international law.² Accordingly, the jurisdictional objection taken by the United Kingdom was, in effect, that not only was there *ex hypothesi* no substantial breach of the Treaty, but there were not even any reasonable grounds on which it could be suggested that the claim had any connexion with the Treaty—in short, to use English terminology, in so far as the claim was put forward under the Treaty, it ‘disclosed no cause of action’, and if this was so, the claim was not, as required by the 1926 Declaration, ‘based on’ the Treaty, and the Commission could have no jurisdiction to entertain it. It was always clear that the nature of this jurisdictional issue was such that,

¹ The Greek Government were in fact in a position almost exactly similar to that in which the United Kingdom has found itself in the *Anglo-Iranian Oil* case (Jurisdiction), the issues in which were in a number of respects very similar to those that arose in the second phase of the *Ambatielos* case—see n. 4, p. 91, below. Judgment in this second phase was given some ten months after that in the *Anglo-Iranian* case. In the latter case, the Iranian Government had accepted the Court’s compulsory jurisdiction, but only in respect of treaties concluded before the date of the acceptance. To bring itself within the terms of this acceptance therefore, the United Kingdom (whose claim was also based essentially on considerations of general international law) had to find a treaty of the right scope and date. It was able to find one imposing on Iran a specific obligation to conform to the general rules of international law, but only of a date subsequent to Iran’s acceptance of the Court’s compulsory jurisdiction. The United Kingdom was unlucky to lose both these cases, when, according to the abstract logic of the argument, a finding against it in either of them should have involved a finding in favour in the other, since in the one case the United Kingdom was plaintiff and in the other defendant. However, despite the similarity of the jurisdictional issues, they presented themselves in rather different ways. (This matter is further discussed in section (III) (3) (c) below.)

² A view strongly reinforced by the fact that a large part of the Greek argument on the Treaty of 1886 consisted in an attempt to bring the general rules of international law within the scope of the Treaty by a process of incorporation through references to other treaties *via* most-favoured-nation clauses. The reasons why the somewhat similar attempt of the United Kingdom in the *Anglo-Iranian* case—which also involved the use of most-favoured-nation clauses—differed radically from the Greek argument (as was shown in the third and last phase of the *Ambatielos* case before the eventual Commission of Arbitration) have been fully stated in a previous article—see this *Year Book*, 32 (1955-6), pp. 88-96.

in order to consider it at all, it would also be necessary to examine the facts of the case fairly fully, and therefore to impinge to some extent on the merits. Therefore, had the jurisdictional issue been before the arbitral Commission, the latter would probably have ordered it to be joined to the merits, which the Court was precluded from doing¹—a point the significance of which will be discussed later. Nevertheless, the two issues were quite distinct—was there a treaty basis at all (that is, in any sense more substantial than the mere citation of treaty clauses by the Greek Government); and secondly, if there was, had there in fact been any substantive breach of the Treaty? The reality of the jurisdictional objection (whether well founded or not) cannot be doubted by anyone who reads the written and oral pleadings in the second phase of the case; and the point is therefore that, had the matter been left to the eventual Commission of Arbitration, there would have been a definite jurisdictional issue for it to determine. Consequently, what occurred could have had the effect of impinging on² what would have been a part of the normal powers of the eventual Commission, namely, its *compétence de la compétence*, or right to determine its own jurisdiction. Given the well-established rule, fully endorsed by the Court itself,³ about the rights of all international tribunals in this respect, this gives rise to a point of principle which calls for consideration.

(ii) *The views of the dissenting Judges in the first phase of the Ambatielos case.* The point of principle referred to above was brought into relief by the dissenting Judges in the *first* phase of the case, of whom there were five.⁴ They all thought that as a matter of interpretation and normal treaty practice, the 1926 joint Declaration, about the arbitration of claims based on the old (1886) Anglo-Greek Commercial Treaty, could not be regarded as a 'provision' of the new (1926) Treaty, and consequently that the Court had no jurisdiction to interpret the Declaration.⁵ But two of them (Judges Zoričić and Klaestad) gave as additional reasons for this view, that it would lead to the issue of the eventual Commission's jurisdiction being determined not by the Commission but by the Court; which they clearly thought would be wrong. This is the same view as that taken by Professor Verzijl.⁶ He not only strongly criticizes the decision about the connexion

¹ The Court in the first phase of the case had decided that it had no jurisdiction to determine the merits itself, and even if it had not *pronounced* on the merits, such a joinder must have involved going into them, as such, and therefore obviously assuming to some extent the functions of the eventual Commission, which the Court held it could not do, and denied any intention of doing.

² Whether it did so, and whether it would actually have *deprived* the Commission of its jurisdictional powers in this respect, is discussed on pp. 46–56 below.

³ See above, subsection (1) of the present section, p. 25 above.

⁴ McNair, Basdevant, Zoričić, Klaestad and Hsu Mo.

⁵ See as to this, last year's article in this series, on treaty interpretation and practice, in this *Year Book*, 33 (1957), pp. 255–66.

⁶ See n. 4, p. 32, above, and the passage in the text it refers to.

between the 1926 Declaration and the 1926 Treaty on its merits, but also makes it clear that he does so precisely because it led to the Court in the second phase appearing to determine an issue of jurisdiction which, in his view, was for the Commission to determine.¹ In addition, the Greek Judge *ad hoc* (Judge Spiropoulos²), while agreeing with the Court that the 1926 Declaration was part of the 1926 Treaty, and that the Court could interpret it, thought that the Court, on the basis of the 1926 Declaration, should simply have decided that the Commission of Arbitration must be set up, and that the parties must have recourse to it, without deciding to consider in the course of a second phase, whether or not the claim was based on the former 1886 Treaty, this being a question of the Commission's jurisdiction which the Commission itself ought to decide.³ The views of these three Judges may now be set out in their own words. Those of Judge Zoričić were expressed as follows (*I.C.J.*, 1952, 79):

'But, according to the Declaration, it is not solely on the validity of the claims that the commissions of arbitration are to decide. On the contrary, any examination of the conditions of the applicability of the Declaration falls within the exclusive jurisdiction of the commissions of arbitration provided for in the Protocol of 1886. It is these commissions, and these alone, that are to decide "on the validity of *such* claims"; they must, therefore, before undertaking an examination of the validity, satisfy themselves that these claims are really "such" as are referred to in the Declaration. It follows that any action by the Court in relation to the Declaration and based on Article 29 of the Treaty of 1926 would inevitably lead to overlapping and to a confusion between the Court's jurisdiction and that of the commissions of arbitration referred to in the Declaration, an extraordinary confusion which, I am convinced, the Parties certainly never intended to create.'

Judge Klaestad, who incidentally also affirmed the general principle of the *compétence de la compétence* for international tribunals, said (*ibid.*, 83-84):

¹ Loc. cit. in n. 4, p. 23, above, at pp. 68-69. Later, Verzijl uses such phrases as 'After the first phase of the proceedings had led to the unfortunate result discussed above . . .' (p. 72) and 'After the regrettable course which the case had taken as a result of the questionable decision on the objection [i.e. in the first phase of the case], which in itself, of course, was an obstacle to the correct solution of the Anglo-Greek controversy as a whole in its preparatory phase before the International Court. . . .'

² Now an elected member of the Court, consequent upon the elections held during the United Nations General Assembly meeting of 1957.

³ Thus Judge Spiropoulos, while making use of essentially the same reasoning on this point as Judges Zoričić and Klaestad, did so to different effect. The result the two latter Judges considered to be the right one, was that the Court ought not to find the 1926 Declaration to be part of the 1926 Treaty, and ought not therefore to hold itself able to determine the question of 'arbitrability' at all—the effect of its doing so, on the powers of the arbitral Commission, being in their view an additional reason for this. But Judge Spiropoulos, while agreeing as to these consequences, and that they should be avoided, thought that the Court should exercise its jurisdiction to determine arbitrability simply by deciding that there was a *prima facie* case of it, sufficient to oblige the parties to set up the Commission, but without deciding the question of the Commission's basic jurisdiction. As will be seen later, this is substantially what the Court proceeded to do in the second phase of the case, by ascribing a purely procedural and not substantive effect to the term 'based', which enabled the Court to avoid the substantive issue of jurisdiction.

'It should, moreover, be taken into consideration that, according to a recognized principle of international law, an international tribunal has the power to determine its own competence. It would accordingly be for the Arbitral Commission itself to decide whether it is competent to deal with a dispute referred to it. The Commission could be excluded from exercising such a competence only by an express and clear provision to that effect; but no such provision limiting the competence of the Commission is contained in Article 29 of the 1926 Treaty or in the Declaration. It is difficult to believe that the Parties, by the provisions of Article 29, intended to confer also on the Permanent Court of International Justice the competence to decide whether a dispute is within the competence of the Arbitral Commission, thereby exposing themselves to the risk that the two tribunals might arrive at opposite results.'

From the concluding words, it will be seen that Judge Klaestad evidently thought that, whatever the Court found as to the question of the arbitral Commission's jurisdiction, the Commission itself would not be precluded from going into and coming to its own decision concerning that question. Finally, Judge Spiropoulos, in a separate but not dissenting opinion, made the following pronouncement (*ibid.*, 55-56):

'But, in questions of arbitration, it is at the present time well recognized that if one of the parties should, for any reason, consider that the arbitral tribunal lacks jurisdiction to deal with the dispute, the question whether it in fact has jurisdiction is one that cannot be decided, as an exercise of sovereignty, by the party raising the objection to the jurisdiction, but it must be decided by the arbitral tribunal itself. The tribunal which adjudicates on the case must also adjudicate on the objection. This is a point on which, at the present time, no one can have any doubt.

'If this principle is applied to the present case, it must follow that, if the United Kingdom Government had accepted recourse to arbitration as proposed by the Hellenic Government, it would have been for the Commission of Arbitration instituted under the Protocol of 1886 to decide whether the Ambatielos claim was, or was not, based on the provisions of the Treaty of 1886.

'In the light of these observations, the Court ought not to require that the Hellenic Government should establish that the Ambatielos claim "is based on a provision of the Treaty of 1886", since the obligation of the United Kingdom to accept arbitration is independent of the question whether that claim is, in fact, based on the Treaty of 1886. This obligation would exist even if the claim were not, in fact, based on the Treaty in question. It is a different thing that—as has already been said—the Commission of Arbitration would only have been able to recognize the Ambatielos claim as valid to the extent that it was, in fact, based on the Treaty of 1886. And it was to secure a decision on the United Kingdom's obligation to accept arbitration that the Hellenic Government seised the Court (see the Hellenic Application and subsequent submissions).'

It is clear from the second paragraph of the above passage, and also from the concluding sentence, that in Judge Spiropoulos' view, if the Court refrained from determining the issue of 'based on the provisions of the . . . Treaty of 1886', the United Kingdom would remain perfectly free to raise this matter before the arbitral Commission, and the Commission would be free to decide it. As to the basis on which the Court could, in Judge

Spiropoulos' view, decide the question of arbitrability, and of the obligation to have recourse to the Commission,¹ this appears clearly from the following further passage (*ibid.*, 56):

'Since, however, in my opinion, the Court is not called on to enquire whether the Ambatielos claim "is based on the provisions of the Treaty of 1886", it may be asked whether, in deciding on the merits of this Hellenic claim (that is to say, on the question whether the United Kingdom is under an obligation to accept arbitration), the Court should confine itself, after hearing the Parties, to referring them to the arbitration provided for by the Protocol of 1886, without being able to consider any other matter.

'In answering this question it is necessary to bear in mind that, when a State has bound itself by a compulsory arbitration clause—and the Protocol of 1886 is an example of such a provision—that State cannot, in principle, have any ground for refusing an offer of recourse to arbitration. It is only in quite exceptional cases, where the invitation to resort to arbitration is manifestly an abuse on the part of the State requesting it, that recourse to arbitration is not compulsory. An example of such abuse would be a case in which one of the parties demanded the setting-up of the arbitral tribunal where no real dispute existed. In such a case it is indeed necessary to admit the other party's right to refuse to nominate its arbitrator. Such an allegation, if made, could of course be considered by the Court, when deciding upon the validity of the claim of the Hellenic Government in this case.'

(iii) *The point of principle involved. Undesirability of duality of jurisdiction.* Judge Spiropoulos, when he said in the first of the above cited passages that 'The tribunal which adjudicates on the case must also adjudicate on the objection', put his finger on the essential point. As is well known, many jurisdictional issues are closely related to the merits; so much so, that it is impossible to go into them without going fairly deeply into the merits, even if the latter are not ultimately pronounced upon; and that in consequence tribunals often refuse to go into jurisdictional issues in isolation from the merits, and order the one to be joined to the other. It is obvious that in cases of this kind² a pronouncement on jurisdiction by one tribunal, when the merits fall to be heard subsequently by another, must risk prejudging the issue on the merits, and prejudicing, or at any rate affecting, the position of one or other party; because even if the merits are not pronounced upon by the first tribunal, some indication of its views concerning these may well be reflected in its pronouncement on jurisdiction, or in the statements of individual members of the tribunal.³ Particularly is there a

¹ And in fact the Court, in the second phase of the case, gave its finding about arbitrability pretty much on the basis here suggested by Judge Spiropoulos (see pp. 46-54 and 56-62 below).

² The *Ambatielos* case was certainly one of them, for the written and oral pleadings show that the parties could not argue the jurisdictional issue without entering into the merits. The Greek Government, indeed, developed its case on the merits quite as fully before the Court as it did before the eventual arbitral Commission, which alone was supposed to consider them.

³ Where issues of merits and jurisdiction lie close together, or are actually intertwined, a process of inference may make it easy, within a vote or so, to predict from the decision and individual views expressed on a jurisdictional issue, how the members of the tribunal are likely to find on the merits.

risk of the view eventually to be taken on the merits by the second tribunal being thus influenced *ab extra* (that is by considerations other than those put forward in argument by the parties themselves, their agents or counsel) where the tribunal which has pronounced on the jurisdictional issue is one having the great authority and prestige of the International Court. In such a case a situation of some embarrassment may be created. This point is well brought out in the following passage from Verzijl¹:

'After the first phase of the proceedings had led to the unfortunate result discussed above the Court then had to deal with the "merits" of the case, i.e. with the question of Great Britain's obligation to refer her difference with Greece over the validity of the Ambatielos claim to arbitration. If the answer should be in the affirmative and a Commission of Arbitration should accordingly be set up, this Commission, though in no way subordinate to the International Court of Justice, would find itself hampered from birth by a pre-natal defect, namely a judgement of the International Court which, though not entirely precluding the Commission from forming an independent opinion on its own jurisdiction under the arbitration clause as all arbitral tribunals are empowered and obliged to do, would be difficult to ignore or to act counter to, since it constituted *res judicata* between the parties to the arbitral proceedings.'

Broadly speaking, tribunals of first instance (which is of necessity what most arbitral tribunals are) should not be called upon to render a decision in the light of one already arrived at in that very case by a court of superior jurisdiction or authority, even though on an issue which is technically and formally (but very often not substantially) a separate one. The dislike of duality of jurisdiction (clearly shared in a general way by the Court,² even though it felt obliged in the actual case to give effect to some duality) was very clearly expressed in some of the dissenting judgments. Judge Klaestad, for instance, said (*I.C.J.*, 1952, 83):

'On the hypothesis that the Court has jurisdiction to interpret and apply the Declaration, there would thus be established a duality of jurisdiction with regard to disputes relating to such claims. For one and the same dispute there would be two different processes of arbitration. Questions relating to the interpretation or application of the Declaration and to a part of the 1886 Protocol, including the question of the competence of the Arbitral Commission, would have to be referred to the Court, while other questions arising out of the same dispute, including the appreciation of the merits, would have to be submitted to the Arbitral Commission. While, for instance, a difference as to the validity of a claim would have to be referred to that Commission, as expressly prescribed by the Declaration, the question whether the difference, in fact, does relate to the validity of the claim would have to be referred to the Court, since this is a condition for submission to arbitration and involves an interpretation or application of the Declaration.

'Such a dual arbitral procedure for one and the same dispute would be so complicated and artificial, so time-wasting and unusual, that it can hardly be believed to have been contemplated and accepted by the Parties to the Treaty and Declaration of 1926.'

¹ Loc. cit. in n. 4, p. 23, above, at p. 72.

² See, for instance, p. 17 of the Judgment in the second phase of the *Ambatielos* case, the first third of the page.

Similarly, Judge Zoričić said (*ibid.*, 78):

‘To the foregoing considerations there should, in my opinion, be added another which is even more important, namely, that the Parties could not have intended to introduce in what has been called one and the same treaty, a dual jurisdiction, that of Article 29 and that of the Declaration, for it is manifest that this must give rise to all kinds of complications.

‘If the Declaration were to be regarded as a provision of the Treaty of 1926, within the meaning of Article 29, it would follow, according to the terms of the latter Article, that “*any dispute that may arise between the Parties as to the proper interpretation or application*” of the Declaration must be submitted to this Court as the Court of arbitration referred to in Article 29.

‘It would be impossible to draw a line of demarcation between the jurisdiction of the Court and that of the commissions of arbitration provided for in the Declaration, so that the Court would have jurisdiction only to decide whether the Parties were bound to have recourse to the arbitration system of 1886, while the commissions of arbitration would be competent to decide disputes concerning the validity of claims based on the Treaty of 1886.’

(iv) *Views of the Court itself.* That the Court was aware of, and far from indifferent to the foregoing considerations, is clear for instance from a passage in its advisory opinion in the *Peace Treaties* case (First Phase) referred to in a previous article in this series.¹ Requested by the Assembly of the United Nations to advise whether certain disputes existed on a point arising under the 1947 Peace Treaties, and if so whether the parties to this dispute were under an obligation to refer these disputes to Commissions of Arbitration provided for under the Treaties, and to appoint their arbitrators accordingly, the Court, in giving affirmative answers, was careful to reserve the jurisdictional rights of the eventual Commissions. After a reference to the fact that the merits of the disputes concerned were in no way involved by the request for an advisory opinion, the Court proceeded (*I.C.J.*, 1950, 72):

‘Furthermore, the settlement of these disputes is entrusted solely to the Commissions provided for by the Peace Treaties. *Consequently it is for these Commissions to decide upon any objections to their jurisdiction in respect of any of these disputes, and the present Opinion in no way prejudices the decisions that may be taken on those objections.* It follows that the legal position of the parties to these disputes cannot be in any way compromised by the answers that the Court may give to the Questions put to it’—[author’s italics].

In the same way the Court, in deciding that it had jurisdiction to indicate interim measures in the *Anglo-Iranian Oil* case, made a statement which involved essentially the same principle, even though it was the Court’s own further and basic jurisdiction that was then at issue (*I.C.J.*, 1951, 93):

‘... the indication of such measures in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case *and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction*’—[author’s italics].

¹ This *Year Book*, 29 (1952), p. 52.

The line taken by the Court in these two cases suggests strongly that in the Court's view the position of the parties (in the *Peace Treaties* case) would have been compromised if any question relating to the jurisdiction of the Peace Treaties Commissions had been pronounced upon by the Court. But if this represented a correct view in relation to advisory opinions, which are not binding on the parties, and are rendered at Assembly request for Assembly purposes, all the more must it be correct for contentious cases, where the decision of the Court on any jurisdictional matter will be binding on the parties, and where any pronouncement of the Court on the jurisdiction of the eventual arbitral tribunal is rendered at the instance of one of the parties, presumably because that party thinks it will be to its advantage to have this jurisdictional issue settled by the Court rather than by the arbitral tribunal. Despite these considerations, the Court in the *Ambatielos* case, might at first sight seem to have done precisely what, in the *Peace Treaties* case, it had disclaimed all idea of doing. If so, this would be the more remarkable in that, on the lines suggested by Judge Spiropoulos, exactly the same result—namely, to oblige the parties to have recourse to the arbitral Commission—was capable of achievement without pronouncing at all on the jurisdiction of the Commission and without prejudging the issue of whether the claim was 'based on the provisions of the . . . Treaty of 1886'.¹ That the Court was preoccupied over the matter is clear from its various emphatic disclaimers of any intention of prejudging the ultimate issues. Yet it would be difficult to reconcile the actual result with some of these disclaimers, unless this result could be regarded as amounting to no more than that advocated by Judge Spiropoulos.² But, as pointed out by Professor Verzijl,³ that would in turn be difficult to reconcile with other language used by the Court. To take only one example, how should such a passage as the following, from the second phase of the case (*I.C.J.*, 1953, 16), be interpreted?

'The Court must refrain from pronouncing final judgment upon any question of fact or law falling within "the merits of the difference" or "the validity of the claim"'. If the Court were to undertake to decide such questions, it would encroach upon the jurisdiction of the Commission of Arbitration. The task of the Court will have been completed when it has decided whether the difference between Greece and the United Kingdom with regard to the validity of the *Ambatielos* claim is or is not a difference as to the validity of a claim on behalf of a private person based on the provisions of the Treaty of 1886 and whether, in consequence, there is an obligation binding the United Kingdom to accept arbitration.'

This statement is difficult to read in any other light than as an intention to leave (but to leave only) questions of the merits and of substantive admissibility to the Commission. It also proclaims a definite intention to deter-

¹ See subsections (b) and (d) below, pp. 46-54 and 56-62.

² As suggested *ibid.*

³ See n. 4, p. 32, above.

mine the basic jurisdictional issue by deciding whether or not 'a claim . . . based on the provisions of the Treaty of 1886 . . .' was involved. Yet for the Court to reserve to itself, and to decide the basic issue raised by any question of the Commission's jurisdiction, would have been just as much 'to encroach on the jurisdiction of the Commission of Arbitration' as to decide issues of admissibility and merits—for the 'jurisdiction' of every international tribunal includes the jurisdiction to determine its own jurisdiction. In the same way, Judge Levi Carneiro, who voted with the majority though delivering a separate opinion, had no doubt that by interpreting the 1926 Declaration, the Court would not only be determining the Commission's jurisdiction, but doing so in such a way as to bind the Commission—a view which it is suggested below is incorrect.¹ In a passage diametrically at variance with the one embodying Judge Klaestad's view,² he said (*I.C.J.*, 1952, 52):

'The Court's future decision on the merits, being confined to a decision on the question whether the Ambatielos claim falls within the framework of the Declaration of 1926, there is no reason to fear that the judgment of the Commission of Arbitration would conflict with such a decision. The only point which the Court will have to decide will be the competence of that Commission. It is clear that even the Commission itself could not then declare that it lacks jurisdiction. If the Court should hold the Commission competent, it will be for it to decide the sole question of the validity of the Ambatielos claim. If the Commission, its competence having thus been established by the Court, refuses to decide this question, the Court will have to order a new commission to be constituted.'

These different expressions of opinion on an essential issue, not only by those Judges differing, but also by those agreeing with the substance of the majority view, reflect the lack of clarity that existed on this point. It would seem that the only way in which these difficulties and contradictions can be avoided is by regarding the decision as having the effect suggested below (i.e. by adopting the 'Spiropoulos view'). Reasons will be given for thinking that this is the correct interpretation of the decision.³ Nevertheless,

¹ See subsections (b), (c) (ii) and (d).

² Quoted in subparagraph (iii) above.

³ The United Kingdom, in the second phase of the case, in effect argued strenuously *against* what may be called the Spiropoulos view, on the ground that the Court, in interpreting the 1926 Declaration, ought not to content itself with deciding that there was a sufficient element of plausibility about the allegation that the claim had a treaty basis to warrant a reference of the matter to the Commission, but ought to go fully into the question—not whether a *breach* of the treaty had occurred, which would have been merits—but whether the treaty *basis* of the claim was a serious and genuine one; or whether, to put the point bluntly, it was an artifice. By that stage of the case, it was obviously in the United Kingdom interest to seek to persuade the Court to find that the claim was not based on the 1886 Treaty; for if the Court found that it was *not*, the case would have ended then and there, and the merits would not have had to be gone into; whereas if the matter went to the Commission at all, even on a basis that allowed the United Kingdom to raise the substantive jurisdictional (i.e. the 'genuinely based') issue before the Commission, the latter was likely to join this issue to the merits, which would then have been heard. It would seem that the Court did not so much reject the United Kingdom contention that the claim was not genuinely based on the Treaty, as not pronounce on the substance of it at all,

the judgment as a whole leaves serious doubts as to what were the real intentions of the Court. In particular, it is never wholly clear whether the Court realized that in pronouncing on the issue whether the claim was 'based on the provisions of the . . . Treaty of 1886' it could be regarded as deciding an issue which it was primarily for the Commission itself to decide, and if so whether it intended to do this. Before proceeding any further, the question must be asked, suppose this indeed to have been the Court's intention, upon what basis, given the objections to such a course noticed earlier, could it be regarded as justified in the particular circumstances of the *Ambatielos* case?

(v) *Legal basis of the Court's action if this was as described in the heading to subsection (a) above—meaning of the word 'based' in the 1926 Declaration.* At first sight it might seem as if the Court had no choice in the matter. It had decided in the first phase of the case that, although it had no jurisdiction to determine the merits of the claim, it had jurisdiction to determine the question of the arbitrability of the claim under the 1926 Declaration. Consequently, as arbitrability depended on whether the claim was 'based on' the Treaty of 1886, the Court was bound by the automatic effect of its own previous decision to determine, not indeed whether the claim was *valid* on the basis of the Treaty, but whether (valid or not) it was substantively and genuinely based on the Treaty, even if this meant in effect determining the jurisdiction of the eventual Commission, and, so to speak, substituting the Court for the Commission to that extent and for that purpose. This seems to have been the view of Judges Zoričić and Klaestad¹, and one reason why they thought that the Court ought not to undertake to interpret the Declaration, and therefore ought not, in the first phase of the case, to take a decision which would involve it in doing that, by finding the Declaration to be a 'provision of' the 1926 Treaty which the Court had jurisdiction to interpret.² It would seem, however, that the term 'based' was capable of several meanings in the context, so that more than one approach to the question of the interpretation of the phrase 'based on the provisions of the . . . Treaty of 1886' was possible; and that in consequence the decision would not necessarily have the effect attributed to it as just described. This point is considered in paragraph (b) below. Nevertheless, assuming that the effect was as described, it would seem that, however undesirable it may be as a general practice that one international tribunal, even the Court, should determine the jurisdiction of another, when that other is the one which is going to hear the merits (if jurisdiction exists), yet this will always be possible and perfectly regular if the parties agree to it. This seems because it adopted a view of what the term 'based' involved, in the context of the Declaration, that enabled it to avoid this (see generally subsections (b) and (d), below).

¹ And see also the views of Professor Verzijl, above, p. 33.

² See subparagraph (ii) above.

by implication to have been the view of the Court itself, when on p. 17 of the Judgment in the second phase of the case, it said:

'In the absence of any manifestation of a common intention of the Parties to the contrary, the Commission of Arbitration cannot be deprived of a part of its competence and no other body can be invested with the authority to determine . . .¹ the treaty basis of the *Ambatielos* claim.'

Did the parties manifest a common intention to this effect in the *Ambatielos* case? Obviously they did not do so expressly or in terms.² Could they be held to have done so impliedly, and if so does an implied consent suffice in the circumstances? Clearly, the effect of the decision in the first phase of the case was that the parties, by making the 1926 Declaration (as the Court found) a part of the 1926 Treaty, had agreed to the Court having the right to interpret the Declaration, and therefore, by implication, and if the Court thought it proper to do so, to deal with the matter in such a way as to settle (whether by affirming or denying it) the jurisdiction of the arbitral Commission. If this view is correct, then the question resolves itself into one not so much of the capacity or *vires* of the Court to determine the jurisdiction of the Commission, but of the *propriety* of its doing so—a matter discussed in subparagraphs (i)–(iv) above. However, while it is clear that, on the view of the status of the Declaration taken by the Court, the parties could be held impliedly to have consented to the Court having the power to interpret it, normally, it would be much more doubtful if such a consent ought to be held to extend to permitting one tribunal to determine the basic jurisdiction of another, if a different possibility should exist which would still allow the first tribunal to prescribe a reference to the second one without prejudging the question of the second tribunal's basic jurisdiction. That such a possibility did exist in the *Ambatielos* case is clear³; and since in fact the better view seems to be that the Court availed itself of this possibility, there is no need here to pursue the question of consent further in relation to the *Ambatielos* case. Moreover, in the particular circumstances of that case, there are grounds for maintaining that both the parties *did*, in the second phase, more or less expressly consent to the Court determining the Commission's basic competence or lack of it, if that is, in fact, what the Court did.⁴ In general, however, considerable doubt must

¹ The words omitted are 'definitively the validity of' thus raising the same doubts as are expressed elsewhere in this article as to what the Court regarded the competence of the arbitral Commission as extending to. However, the general trend of thought is clear.

² That is, certainly not under any treaty or other agreement entered into prior to the case; but it is possible that their respective attitudes in presenting their arguments in the second phase of the case did involve something amounting to specific agreement—see n. 4 on this page.

³ See subsection (b) below.

⁴ The United Kingdom could, on the basis of its argument in the second phase of the case (see n. 3, p. 43, above) be regarded as having consented to the Court determining the jurisdiction of the Commission, though it was, of course, contended that this ought to be in the sense of finding the Commission incompetent; while Greece, whose object was a hearing on the merits

exist whether a purely inferential consent of the parties really suffices to give one tribunal the power to determine the jurisdiction of another, before whom those parties will then have to plead the merits of the case if the jurisdiction is affirmed. Rosenne,¹ for instance, states quite categorically that the 'general principle'—i.e. of the right of a tribunal to determine its own competence 'is strong enough to outweigh all presumptions to the contrary...; and only a most explicit stipulation in the title of jurisdiction can cancel it'.²

(b) *Can the decision of the Court (and if possible should it) be regarded, not as intended to tie the hands of the Commission as to its jurisdiction, but simply as a decision that there must be recourse to a Commission of Arbitration, either party remaining free however, to place any relevant issue before the Commission, including the issue of its own substantive jurisdiction?*

(i) *Meaning of the term 'based' in the phrase 'claims... based on the provisions of the... Treaty of 1886'.* As regards the words in brackets in the above heading to subsection (b), it has already been suggested that an affirmative answer should be given to them. As regards the possibility of doing so, the first question is whether more than one meaning can be ascribed to the term 'based' in the relevant phrase from the 1926 Declaration. Actually, there seem to be no less than four or five possible senses in which this term can be understood in the context. The first, at one extreme (i), is that it involves that the claim must be *valid* on the basis of the treaty concerned. This would clearly include the ultimate merits and such an interpretation was rightly rejected by the Court on that ground.³ At the other extreme (v) the term might be said to denote any claim alleged to have a treaty basis, or citing articles of the Treaty, even if manifestly and on the face of them unconnected with the claim, and inapplicable. Judge Spiropoulos himself excluded that interpretation,⁴ and the Court in effect rejected it when it said (*I.C.J.*, 1953, 18):

'It is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty of 1886.'

before the Commission, could be assumed to be opposed to any decision that would allow the purely jurisdictional issue to be raised, or re-opened, before the Commission. Still, the abstract point, especially of propriety, remains.

¹ *Op. cit.* in n. 2, p. 8, above, at pp. 341-2.

² It must be frankly stated that the *Ambatielos* case, taken as a whole, serves as a very good illustration, and even warning, of the dangers of attributing consent to States by a process of inference, particularly in matters of jurisdiction. In the *Ambatielos* case, it led to the United Kingdom being compelled to submit to arbitration a claim it had never specifically (i.e. directly) agreed to arbitrate, and to do this on the basis of a seventy-year-old treaty which, it is safe to say, neither the United Kingdom Government of that day, nor any other government similarly placed, would have regarded as naturally covering, or having reference to, such a claim as the *Ambatielos* claim (see further as to this section (III) (3) (c) below).

³ See, for instance, some of the passages quoted in n. 4, p. 32, and in subsection (a) (iv) above. Further passages in the same sense are quoted below.

⁴ See final paragraph of passage quoted at the end of subsection (a) (ii) above.

Equally the Court rejected (*ibid.*, 16) a Greek suggestion (IV), only slightly less extreme than (V), that it would suffice if the claim did not '*prima facie* appear to be unconnected with the provisions of the Treaty of 1886'. There remain two other possibilities, namely, (II) which was the one put forward by the United Kingdom, and (III) which is the one the Court appears to have adopted. Interpretation (III)—the Court's—was based on the test of 'plausibility' and was stated as follows (*ibid.*, 18):

'The Court must determine . . . whether the arguments advanced by the Hellenic Government are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty.'

The United Kingdom in effect argued that something more solid than mere plausibility was required before the claim could be said to be based on the Treaty in such a way as to found the Commission's jurisdiction; although it was also an essential part of the United Kingdom case that even by the criterion of plausibility the claim could not be said to be based on the Treaty. This United Kingdom interpretation (which, to speak frankly, the Court seems to have somewhat misunderstood, apparently regarding it as suggesting that before the Court could send the case to the arbitral Commission it must satisfy itself, *prima facie*, that a *breach* of the Treaty had occurred¹)—this interpretation (II) was to the effect that while the *correctness* of the Greek allegations of fact could not be gone into, these allegations must disclose a *potential* breach of the Treaty, in the sense that *if* correct, there would be genuine grounds for arguing that such a breach had occurred and a genuine case based on the Treaty to answer. If, on the other hand, it was apparent on the face of the matter (as the United Kingdom contended) that, even if all the Greek allegations were true, no breach of the Treaty could have occurred, or that such a breach could only be arrived at by placing a highly strained and unusual construction on the provisions of the Treaty—and if, parallel with that, it was evident that the issues which the claim really gave rise to were issues of general international law, then it must be concluded that, whatever the form or verbal basis of the claim, it had no substantive basis in the Treaty, and ought not to be allowed to rank as a claim 'based on the provisions of the . . . Treaty of 1886'. The Court at one point in its decision seemed to

¹ Some misunderstanding may have arisen from the fact that the French translation (or at any rate the word used) for 'based', is '*fondé*', and *fondé* in French is apt to mean not merely founded but *well-founded*, i.e. that there is a good case in fact and in law; whereas 'based' is quite neutral as to whether the case is a good one or not. Clearly the term '*fondé*' cannot have been used in this sense in the French version of the 1926 Declaration, but the fact that it often is so used, and that the United Kingdom references to 'based' and what it meant, were usually translated by '*fondé*', may well have given rise to misunderstanding as to what the real United Kingdom contention was.

recognize the reasonableness of this line of argument,¹ saying (*I.C.J.*, 1953, 18):

'In other words, if it is made to appear that the Hellenic Government is relying upon an arguable construction of the Treaty, that is to say, a construction which can be defended, whether or not it ultimately prevails, then there are reasonable grounds for concluding that its claim is based on the Treaty. This view seems to have been in the mind of Counsel for the United Kingdom when he said:

'... we are not, of course, suggesting that the Court must decide whether the claim is valid or not, that is to say, *well-founded* on the Treaty, for that would be a matter of the ultimate merits. . . . We do not suggest that the Court must consider whether the claim is '*bien fondée*', but what we say is that it must at least consider whether the claim is '*fondée*'. . . .'

But, having stated that the matter depended on whether the Greek Government appeared to be 'relying upon an arguable construction of the Treaty, that is to say, a construction which can be defended', the Court did not then go on to consider whether the Greek construction was in fact arguable or defensible, or (beyond barely stating them) to discuss or assess in any way the merits of the United Kingdom contention that the Greek construction of the Treaty was not arguable or defensible. In short, it never dealt with the substance of the jurisdictional objection, and it contented itself with, in effect, listing or stating briefly the Greek arguments (without any assessment of their worth or even of their 'arguability' as interpretations of the Treaty), and (equally briefly) the United Kingdom replies (also without attempting to consider how far they succeeded in establishing that the Greek interpretation was not even an arguable one²), and finally concluded (*ibid.*, 22) that since the parties were obviously advancing conflicting contentions about the meaning and effect of various provisions of the 1886 Treaty,

'... this is a case in which the Hellenic Government is presenting a claim on behalf of a private person *based on the provisions of the Anglo-Greek Commercial Treaty of*

¹ However, an earlier rejection of the United Kingdom contention on pp. 16-17 of the Judgment is not altogether easy to reconcile with the passage here quoted.

² For instance, in regard to what was central to the whole United Kingdom thesis, namely, that the claim was essentially a general international law not a treaty claim, the Court contented itself with a simple statement that 'The United Kingdom also advances a number of other arguments designed to show that the facts alleged by the Hellenic Government, if true, would amount to a denial of justice, and that an allegation of denial of justice must be based on general principles of international law and cannot be based on Article X of the Treaty of 1886 dealing with commerce and navigation.' But that was all. There was no discussion of the matter, and no view was expressed whether this contention was a good one or not. Yet a pronouncement on it was essential to any substantive finding as to whether (irrespective of its ultimate validity) the claim was or was not 'based' on the Treaty. In short, the Court never went—or never got—any farther than finding that there was a clear difference between the parties as to the basis of the claim, and as to whether it was or was not based on the Treaty, and that this sufficed to oblige them to set up and have recourse to the Commission: whereas what the 1926 Declaration clearly required on its language, was a *substantive* finding whether the claim (irrespective of its ultimate merits and validity) really was based on the Treaty and not on something else—or was at least based on the Treaty as well as on something else.

1886, and that the difference between the parties is the kind of difference which, according to the Declaration of 1926, should be submitted to arbitration.⁷

In the circumstances, the phrase italicised in the above passage obviously begged the whole question of the treaty basis of the claim. Thus the Court, while seeming at one point (in the passage from p. 18 of the Report quoted above) to concede the United Kingdom view of what was involved by being 'based', in practice never finally pronounced itself as to that, or indeed as to any other view of what was involved by being 'based'. This may have been partly because the Court considered it impossible to go into the substantive question of the arguability and defensibility of the Greek construction of the Treaty without going into issues appertaining to the merits—in effect without a joinder of the jurisdictional issue (the genuineness of the basis of the claim considered as a *treaty* claim) and the merits (the validity of the claim). This view is reinforced by the fact that, as is shown by the passage quoted in the footnote below,¹ the Court does not seem to have treated the question of the genuineness of the treaty of the claim as being a separate question, *not* relating to the merits, whereas actually, it is clear that the two questions are quite distinct.² No doubt where the basis is non-existent or spurious, the claim cannot be valid. On the other hand, a claim may have a genuine basis in a treaty, yet on examination the facts may fail to establish a breach of it—in which case the claim will be genuinely based on the treaty, but not valid under it. However, if it was the case that the issue of jurisdiction in the second phase of the *Ambatielos* case, namely, the reality of the basis of the claim in the Treaty of 1886, could not conveniently, if at all, be considered apart from the merits (*validity* as opposed to *reality* of the treaty basis), this would merely endorse Professor Verzijl's view as to the difficulty in which the Court found itself by reason of its decision in the first phase of the case:³ for it had held that it had no jurisdiction to go into the merits of the claim. Yet by the same decision it had obliged itself to interpret the 1926 Declaration, and to determine whether the claim was based on the 1886 Treaty, which, however, it could hardly do without entering to a considerable extent into the merits. Thus the Court in effect reduced itself simply to registering the

¹ The Court said (Report, p. 17) that 'It must have been their intention [i.e. of the parties] that the genuineness of the treaty basis of any claim, if contested, should be authoritatively decided by the Commission of Arbitration, together with any *other* questions *relating to the merits of the claim*' [italics added]. But the genuineness of the treaty basis of the claim was quite a distinct question from that of its *validity* on that basis, and it was an issue that related to the jurisdiction of the Commission under the 1926 Declaration and not to the 'merits' of the claim. This is a further example of the failure of the Court to distinguish clearly between the ultimate merits of the claim, and its jurisdictional *basis*.

² The Court seems in fact to have treated the question of 'basis' as equivalent to merits; but the genuineness of the treaty basis of a claim is not the same thing as the validity of the claim under the treaty.

³ See passage quoted in n. 1, p. 37, above.

existence of differences of opinion between the parties as to the real basis of the claim, and on that footing to find that there was a case to be submitted to the arbitral Commission. But to decide that the parties are at variance as to *whether* a claim is based on a treaty, is not in any way to decide that it *is* so based, and this is what any real interpretation of the terms of the Declaration required.

(ii) *Actual effect of the Court's decision.* If the above analysis is correct, a very confusing position is disclosed. In the previous subparagraph, various possible conceptions of the term 'based' have been considered, namely, in ascending order of stringency, (I) 'remote connection'; (II) 'not *prima facie* unconnected'; (III) 'plausibility'; (IV) the United Kingdom interpretation ('genuine ground of the claim'); and (V) 'based' in the sense of being 'valid'. It had been shown that the Court rejected all except (III) 'plausibility' (p. 18 of the Judgment). But then (lower on the same page) the Court went on to propound the test of arguability and defensibility, which is a considerably more severe criterion than mere plausibility; and it was the latter that it professed to apply. But, as in fact the Court never went into the substance of the question of the arguability and defensibility of the Greek interpretation of the Treaty, and merely listed or stated the two opposing sets of arguments without pronouncing on their merits, it clearly never actually applied this criterion at all. Thus the Court, while adopting a theoretical criterion of what was involved by 'based', did not in the end apply this *or any other* criterion; and the real truth seems to be that if the actual rather than the professed grounds of the decision are considered, the Court never decided one way or the other whether the claim was based on the Treaty. It decided simply that there existed a dispute as to whether it was so based or not, and that this sufficed to give rise to an obligation to refer the case to the arbitral Commission. This view is borne out by the 'dispositif' of the judgment which makes no specific mention of the 'based' point, and simply says (*I.C.J.*, 1953, 23) that the Court

'finds that the United Kingdom is under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity, under the Treaty of 1886, of the Ambatielos claim.'

If this view is correct, the Court never decided the question of the eventual Commission's jurisdiction, and left that question intact for the determination of the Commission itself, should the defendant party raise it, or the Commission itself do so *proprio motu*. That such was the Court's intention may be inferred from the following passage taken from p. 17 of the Report:

'The Declaration of 1926 was, as previously stated, agreed upon to ensure that the method of arbitration provided for in the Protocol of 1886 should be employed for the settlement of a limited category of differences concerning the Treaty of 1886, namely,

differences as to the validity of claims on behalf of private persons based on that Treaty. At the time of the signature of the Declaration, it could hardly have entered the minds of the Parties that before arbitration should be in order, the Party requested to accept that procedure might insist that the question whether a claim was genuinely based on the Treaty of 1886 should first be examined and definitely settled by that Party itself or by an organ other than the Commission of Arbitration. It must have been their intention that the genuineness of the treaty basis of any claim, if contested, should be authoritatively decided by the Commission of Arbitration, together with any other questions relating to the merits of the claim, just as, before 1926, any question as to whether a certain controversy was concerned with the interpretation or execution of the Treaty of 1886 would have been settled by such a commission. If the Ambatielos claim had been referred to arbitration, it would have been for the Commission to decide whether the claim had a legal basis in respect of the Treaty of 1886. In the absence of any manifestation of a common intention of the Parties to the contrary, the Commission of Arbitration cannot be deprived of a part of its competence and no other body can be invested with the authority to determine definitely the validity of the treaty basis of the Ambatielos claim.¹

In spite of the difficulty which the Court seems to have experienced in realizing that the United Kingdom contention involved an issue essentially affecting the *competence* of the eventual Commission, and not the merits of the claim—a difficulty clearly evidenced by the phrase in the above passage reading: 'It must have been their intention that the genuineness of the treaty basis of any claim, if contested, should be authoritatively decided by the Commission of Arbitration, *together with any other questions relating to the merits of the claim*' (italics added)—the above passage seems to indicate an intention that this jurisdictional issue of whether the claim was really based on the Treaty or not, should, if necessary, be decided by the Commission and not by the Court.¹

¹ That is, if raised before the Commission, or if the Commission took the point *proprio motu*—neither of which occurred. It may be useful to mention that the United Kingdom was deterred from raising this matter before the Commission partly by the great difficulty of determining the exact effect of the Court's decision in the second phase of the case, and partly by the realization of the embarrassment that might be caused to the Commission if it were either called upon in effect to interpret a judgment of the International Court, or else to give a decision as to its own jurisdiction which might appear to be contrary to a finding of the Court—i.e. to decide that it had no jurisdiction when the Court might seem to have found that it had. In addition, in view of the extent to which the jurisdictional issue was involved with the merits, and after two preliminary phases had already been gone through before the Court, it seemed preferable not to raise further jurisdictional issues as such, but to use the jurisdictional point as part of the argument on the merits—i.e. to contend that since the claim was not even genuinely based on the relevant treaty, no breach of that treaty *could* have occurred. The point to which attention should be drawn however, is that the Judgment of the Court, while not itself determining the jurisdictional issue, *effectively prevented it, in practice, from being raised before the Commission*. Thus the United Kingdom was wholly unable to obtain any determination of what was in many ways the most important issue in the case. Apart from the views expressed by the four jointly dissenting Judges in the second phase of the case (McNair, Basdevant, Klaestad and Read), there was no determination of this essential question. These four Judges did, however, go into the substance of the jurisdictional objection and agreed entirely with the United Kingdom contention that the claim was *not* based on the 1886 Treaty, because it was a general international law, not a commercial treaty claim, and therefore that there was no case to go to the Treaty Commission.

(iii) *Underlying reasons for the above outcome.* The truth seems to have been that the Court, in the second phase of the *Ambatielos* case found itself in a considerable difficulty; and the fact that this arose from the nature of its finding in the first phase of the case, which Professor Verzijl characterized as 'unfortunate', 'regrettable' and 'questionable', did not render the difficulty any the less real. This difficulty involved a double dilemma, the first aspect of which has already been discussed,¹ namely, that the Court, although it had decided that it had jurisdiction to interpret the 1926 Declaration, probably could not in fact interpret it in any substantive sense without entering into the merits, which it had rightly held itself as incompetent to do. The other aspect of the dilemma was as follows. As has already been shown, had there been a dispute between the parties, alleged by one of them to involve the Treaty of 1886, and had this dispute gone straight to an arbitral Commission under the 1926 Declaration,² it would have been open to the defendant party to maintain that since the jurisdiction of the Commission depended on the 1926 Declaration, and since under that instrument the Commission could only entertain claims 'based on the provisions of the . . . Treaty of 1886', the Commission must, in case of any doubt (as a preliminary point and quite irrespective of the merits), satisfy itself that the claim was substantively based on that Treaty.³ Suppose it, for instance, to have been the position that the claim was quite clearly based on some other treaty, then the Commission could not entertain it, and must decline to give any finding on the merits, even if, in order to pronounce on the jurisdictional issue, it had had to go into the merits to some extent. It followed therefore, that if the International Court carried out its original decision to interpret the 1926 Declaration, by entering into and pronouncing on the substance of the jurisdictional objection that the claim was not really based on the 1886 Treaty, it would be determining the

¹ See pp. 49-50 above.

² The *Ambatielos* claim had not gone straight to the Commission of Arbitration under the 1886 Treaty, because (as explained in n. 1, p. 51, above) it was not originally put forward on the basis of the Treaty at all, but as a general international law claim. Any arbitration at that stage would have had to be purely voluntary and *ad hoc*, and the United Kingdom declined it for reasons which are sufficiently apparent from the nature of the claim, and which were fully set out in the United Kingdom pleadings before the Court. When eventually the claim was (after about fifteen years) put forward as a *treaty* claim, the United Kingdom considered the alleged treaty basis to be dubious and to be directed mainly to founding an obligatory jurisdiction. Since, therefore, it was considered that no genuine dispute on the basis of the treaty existed, reference to the Commission provided for by that treaty was equally declined. It is no doubt very much open to question how far a State ostensibly bound to refer certain disputes to arbitration, ought to decline to have recourse to the designated tribunal on the ground that, in its view, no dispute of the class to which the obligation applies has arisen—since technically this is itself a matter for the tribunal, for it involves its jurisdiction, and therefore (*compétence de la compétence*) is determinable by the tribunal. It can only be said that if ever there was a case in which such an attitude was excusable, or at least understandable, it was the *Ambatielos* case.

³ This was precisely the view (of what the Court ought to do) taken by the four jointly dissenting Judges (McNair, Basdevant, Read and Klaestad) in the second phase of the case—see subsection (4) of the present section, and section (III) (3) (c) (ii) below.

jurisdiction of the Commission, or at any rate pronouncing on a matter appertaining to the Commission's basic jurisdiction. If it wished to avoid this, then it must decline to go into the substantive issue of whether the claim was indeed based on the Treaty, even though it might be manifest that to avoid doing so was not really to interpret the Declaration, but merely to decide that the parties were at variance about its interpretation—i.e. about whether the claim was based on the Treaty—and therefore the case must go to the Commission. Such was the dilemma, and the Court seems to have met it by choosing the second of these alternative courses. Even though the Court never seems to have entirely separated the question of the merits of the claim from the genuinely jurisdictional issue that was involved (i.e. by the United Kingdom contention that this was a claim based on general international law and not on commercial treaty considerations, and therefore one that was not arbitrable under this commercial Treaty), it clearly felt that by entering into and pronouncing upon such a question as that, it would be dealing with something that appertained, and ought to be reserved to the Commission.

Conclusion. If this analysis is correct, it would appear that the Court did not, in the second phase of the *Ambatielos* case, act in a manner at variance with its clear pronouncement in the *Peace Treaties* case quoted above,¹ the effect of which was that in principle one tribunal ought not to determine matters relating to the jurisdiction of another, since otherwise the legal position of the parties before the second tribunal might be prejudiced. But in order to avoid this in the *Ambatielos* case, the Court was, on account of its decision in the first phase of the case, forced into a number of implicit contradictions, including in effect a refusal in the second phase of the case to do what it had decided in the first phase that it would do.² This seems to be precisely the conclusion reached by Professor Verzijl in the following passage,³ part of which has been quoted earlier:

'Even if the Parties really had intended to vest the Court with competence to remedy a well-known defect in the traditional arbitral machinery there was no reason to believe that they intended thereby also to deprive the arbitral tribunal of its inherent powers of decision, which cover not only the merits of the case, but also and as a necessary preliminary its own jurisdiction to deal with it.

'After the regrettable course which the case had taken as a result of the questionable decision on the objection, which in itself, of course, was an obstacle to the correct solution of the Anglo-Greek controversy as a whole in its preparatory phase before the International Court, there was, in my opinion, no other conclusion possible in the

¹ See p. 41 above.

² This is not an overstatement. No one who reads the written and oral pleadings in the second phase of the case can doubt that although the Court may have been justified in doing so in the circumstances, it avoided the real issue of interpretation that arose on the 1926 Declaration, and never decided whether the claim was or was not based on the 1886 Treaty, even though this was essentially an issue of jurisdiction not of merits.

³ Loc. cit. in n. 4, p. 23 above, at p. 76.

second phase, save that drawn by the Court, *viz.* the statement that Greece maintained and Great Britain denied the relevancy of certain provisions of the Treaty of 1886 for a final judgment on the *validity* of the Ambatielos claim and that, therefore, its *arbitrability* under the 1886 Protocol must be recognised.¹

Professor Verzijl clearly thinks that by confining its decision to the question of the *arbitrability* of the claim before the Commission, the Court must be regarded as not having decided the claim to be substantively based on the relevant treaty, and he continues as follows:¹

'This conclusion, however, would seem to be acceptable only on the understanding that in spite of this—essentially *prima facie*—judgment of the Court, the Commission of Arbitration now to be set up, should remain completely free not only, of course, to reject the claim of Greece on behalf of her national on its merits, into which the Court could not enter, but also, as a preliminary, to decide that the *prima facie* conclusion of the Court had revealed itself, on a closer inspection of the (real) merits of the claim, as unwarranted under the provisions of the Treaty and Protocol of 1886 and the Declaration of 1926 as they must be interpreted in the light of their genesis and of the real issues of the case as elucidated by the legal arguments of the parties in the final arbitral suit. So that, on such closer and decisive inspection, the Commission must even as yet pronounce its lack of jurisdiction under the arbitration clauses governing its activity.'

The view thus expressed involves (correctly it is submitted) taking the line that the Court, in 'interpreting' the 1926 Declaration, adopted a construction of the term 'based' which did not determine the substantive jurisdictional issue one way or the other, and left this to the Commission of Arbitration. There is no passage in the Judgment that indicates beyond doubt that this was the Court's intention; but (subject to the query as to whether the Court really distinguished the substantive jurisdictional issue clearly from issues appertaining to the merits) the inference is one that can legitimately be drawn from the constant disclaimers of any intention to impinge on the sphere of the Commission—a sphere that in principle included the *compétence de la compétence*. (If so, the Court's insistence on not interfering with the competence of the Commission to determine its own jurisdiction is the more striking, in that it could have held that the parties had specifically invited it to do this very thing—see n. 4, p. 45, above.)

(c) *Assuming (contrary to the above conclusion) that the Court did intend to determine the jurisdiction of the Commission, would such determination have been binding (i) on the parties, (ii) on the Commission?*

(i) *On the parties.* The answer would seem to be certainly 'Yes', in view of Articles 59 and 60 of the Statute,² and this is also the view of Professor

¹ *Ibid.*, pp. 76–77.

² This is the accepted implication of Article 59—'The decision of the Court has no binding force except between the parties and in respect of that particular case'—reinforced by Article 60—'The judgment is final and without appeal . . . '.

Verzijl who (though evidently not considering that the decision would be binding on the Commission) thought that it would 'constitute[d] *res judicata* between the parties to the arbitral proceedings'.¹ However, in view of the ambiguous nature of the Court's Judgment in the second phase of the case, and the evident uncertainty as to whether or not it involved a finding as to the Commission's substantive jurisdiction—(see the foregoing observations *passim*)—it would certainly have been open to the defendant party to raise before the Commission the question *whether*, on the basis of the Court's Judgment, it was open to that party to question the Commission's jurisdiction (though whether the Commission would have held itself able to accede to a request involving the 'interpretation' of a decision of the Court is another matter²). Nevertheless, the fact that the Court's decision might have given rise even to a possibility of this sort, represents a further comment on the anomalous character of the situation created by the decisions in the two phases of the case before the Court. It remained the fact that, subject to interpretation either by the Commission or by the Court itself, the decision of the Court, *if* it determined the substantive jurisdiction of the Commission, was necessarily binding on the parties as regards the existence of that jurisdiction.

(ii) *On the Commission.* The answer is surely 'No'—and this seems also implicitly to be Professor Verzijl's view.³ In general, all international tribunals have the right to take, *proprio motu*, points relating to their own jurisdiction, and to find that they lack or ought not to exercise it, whether or not either of the parties objects to the jurisdiction, and even if, for some reason or another, the parties are themselves precluded from doing so.⁴ In the absence of any established international hierarchy of tribunals with their respective jurisdictions defined by law, no finding of one tribunal (even the International Court) as to the competence of another can prevent that tribunal, acting *proprio motu*, from going into the question *de novo*, and, if it thinks fit, finding differently. Such a preclusion, so to speak, could, it seems, only operate if the parties had not merely agreed that another tribunal could determine the jurisdiction of the tribunal competent to determine the merits (assuming jurisdiction were found to exist), but had

¹ Loc. cit. in n. 4, p. 23, above, at p. 72.

² The Commission could have held that the interpretation of a judgment of the Court was a matter for the Court itself under the second sentence of Article 60 of the Statute—'In the event of a dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.' By referring the parties to the Court under this provision, the Commission could have compelled the Court to make clear whether its decision had been intended to predetermine the substantive issue of the Commission's jurisdiction or not. However, as already stated (see n. 1, p. 51, above) the jurisdictional issue was never raised before the Commission.

³ See passage quoted in subsection (b) (iii) above. In the same sense, see the quotation from Judge Klaestad's dissenting opinion in the *Ambatielos* case given in subsection (a) (ii) above; but see *contra* Judge Levi Carneiro as quoted in subsection (a) (iv).

⁴ See subsection (1) (b) above.

further agreed that in such case it should not be open to the second tribunal to re-open the matter, or question its own jurisdiction. In such a case, there would in fact, to that extent, be a limitation on the tribunal's *compétence de la compétence*, arising directly from the agreement of the parties. But such a limitation must be express and cannot be implied.

(d) *How far in respect of the foregoing questions is the situation affected according as to whether the tribunal which will determine the merits (if jurisdiction exists) has or has not actually been constituted?*

It is submitted that in this query lies the key to the understanding of the peculiar course followed by the *Ambatielos* case, and also the real solution to the problems it raised. Professor Verzijl, in particular, draws pointed attention to the difference between the case where a tribunal is called upon to determine the jurisdiction of another tribunal already constituted and set up by the parties and the case where this has yet to be done, so that the immediate question is *whether* the parties are under an obligation to do it.¹ Does the latter situation (which was that obtaining in the *Ambatielos* case) give rise to a jurisdictional issue and if so in what sense? In order to answer this question, closer consideration must be given to the general nature of jurisdictional issues and of questions of merits respectively.²

(i) *Is there a hierarchy of issues within the general field of jurisdictional issues (and also of questions of merits)?* It would seem, on analysis, that the usual straightforward division between jurisdictional questions and questions of merits is over-simplified, and inadequate to take account of situations that can give rise to a variety of consequences. The point is best considered with reference to an ordinary arbitral tribunal, not the Inter-

¹ See loc. cit. in n. 4, p. 23, above, at pp. 75-76. Verzijl actually lists three possible cases, namely, (a) where the tribunal is not only already constituted, but also either party can seise it by unilateral application; (b) where the tribunal is constituted, but some further step on the part of the parties (such as the drawing up of a *compromis*) is necessary before it can function; and (c) where the tribunal has not yet been constituted at all; and he groups cases (b) and (c) together since, in both, no proceedings can take place if the parties fail (or one of them refuses) to take the necessary steps. The present writer has, for the sake of simplicity, thought it sufficient to draw the contrast on the basis of the tribunal having, or not having, been constituted, as the case may be. As Verzijl himself says, in case (a) it would (though not theoretically impossible) be very unlikely that any question affecting the jurisdiction of the tribunal would come before, or fall to be determined by, the International Court, or indeed by any tribunal other than the original one itself, to which unilateral application can *ex hypothesi* be made to determine any jurisdictional issue arising. Case (b) is evidently also bound to be rare, since in those cases where a *compromis* (or other form of special agreement outside the basic agreement to have recourse to arbitration) is needed, it will be needed precisely in order (*inter alia*) to constitute the tribunal, and usually, if such an instrument exists, it will cover both the nomination of the arbitrators and all other relevant matters; while if it does not exist, there will normally be no tribunal. Hence, as a general rule, the setting up or non-setting up of the tribunal will furnish a sufficient criterion for the purposes of the present argument. If, however, there should be a case in which the tribunal has been constituted, or is otherwise in existence, but cannot function for want of a further step on the part of the parties, the case would be governed by similar considerations to those which obtain where the tribunal has not been set up at all.

² For some previous discussion of the matter see section (I) (6) above.

national Court which is a standing tribunal that does not have to be constituted or set up. If the jurisdictional field of a given tribunal is, for example, that of all disputes arising under a certain treaty containing a provision providing for the reference to the tribunal of any disputes concerning its interpretation or application; and if there is a question whether a given dispute *is* about the interpretation or application of the treaty, or whether it relates to a matter covered by the treaty—this might be called a question concerning the tribunal's 'substantive' jurisdiction.¹ But if the tribunal is not a standing one, and has to be set up by the parties, how is any question as to whether it has (substantive) jurisdiction to be got before the tribunal, if one of the parties refuses to set it up on the ground either (a) that no real dispute on the merits exists; or (b) that it is manifest on the face of the matter ('by inspection' so to speak) that no breach of the relevant treaty has or could, on the facts, have occurred; or (c) that the circumstances of the case are such as to cause the dispute to fall wholly outside the class of case covered by the arbitration clause of the treaty? The first two arguments were precisely those put forward by the governments of Bulgaria, Hungary and Roumania in the *Peace Treaties* case, and the last was that relied on by the United Kingdom in the *Ambatielos* case. On the basis of a dispute arising under or relative to a given treaty, the following broad pattern of questions emerges: (1) has there been a *breach* of the treaty (merits of the claim); (2) is the dispute one that concerns the interpretation or application of the treaty—i.e. does it relate to the *class* or category of matter covered by the treaty (substantive jurisdiction of the tribunal); and (3) is there a dispute about whether there is a dispute—or is there a dispute about whether the circumstances are sufficiently closely connected with the treaty to warrant setting up the treaty tribunal, in order that it may consider whether there is a case for it to go into or not? These last questions might be called (not substantive but) '“preliminary” issues of jurisdiction'.² Their character is obviously jurisdictional, but it is not the substance of the tribunal's jurisdiction that they raise, but something preliminary to that. The essential question that they raise is whether the tribunal ought at least to be set up. At that stage, the question is not

¹ Naturally, this is only by way of example. Several other matters may raise questions of substantive jurisdiction—see section (I) (i) at the beginning of the present article.

² They are not, of course, the only possible ones. For instance the question of a tribunal's competence to prescribe interim or provisional measures of protection or conservation, such as the Court had to consider in the first phase of the *Anglo-Iranian Oil* case (see § 2 (II), pp. 107-22 below) would afford an example of a 'preliminary' issue of jurisdiction in the sense that it tends to arise prior to, and quite independently of the issue of the substantive jurisdiction of the tribunal to hear and determine the merits of the claim. In the *Anglo-Iranian Oil* case, the Court decided that it had jurisdiction to indicate interim measures in advance of any decision as to its substantive jurisdiction in the case, and even though this jurisdiction was disputed by the defendant party; and disputed to such effect that the Court eventually, in the second phase of the case, decided that it had no jurisdiction in respect of the merits.

whether the tribunal has (substantive) jurisdiction in the case, but whether it ought to be set up in order precisely to consider, if necessary, *whether* it has such jurisdiction or not. Thus, where no standing tribunal exists, every dispute is liable to involve three distinct issues or phases which, taking them in reverse order, are: (a) has the defendant party committed a breach of treaty or of a rule of general international law; (b) would a given tribunal, if set up, have jurisdiction to hear and determine (a); and (c), if there is a dispute about (b), are the parties under an obligation to set up the tribunal in order that it can consider (b) and any other jurisdictional issues arising?¹ It is because the parties are so frequently at variance on issue (c) as well as on issues (b) and (a) that, despite an ostensible obligation to arbitrate, the arbitration proves abortive owing to the fact that the arbitral tribunal never gets set up, so that issue (c) cannot be determined. Suppose, however, that issue (c) can be got before *an already standing* tribunal, whose findings can either bind the parties, or may be expected to influence their actions, the case is different. But in that event ought this other (standing) tribunal—even if it is the Court—to do more than determine issue (c), namely the obligation to set up and have recourse to the arbitral tribunal? Ought it to purport to go into issue (b)—the substantive jurisdiction of the arbitral tribunal—which, normally, and in accordance with the principle of the *compétence de la compétence*, would, if the parties had set it up straight away, be for the arbitral tribunal itself to decide?

(ii) *Necessity for distinguishing between substantive jurisdictional issues and preliminary questions of jurisdiction.* It was the failure to draw any clear distinction between issues (b) and (c) that caused most of the difficulty and much of the confusion in the *Ambatielos* case, and there is every reason to think that, during the second phase of the case, both the Court and the parties were talking and thinking of different things. Indeed, to this day, it has never been clear on the face of the Judgment whether the Court drew any real distinction between issues (b) and (c) or whether, in deciding issue

¹ A similar point of hierarchy can also arise in regard to questions relating to the merits, but for present purposes need not be discussed here. It will however be remembered (see subsection (I) (6) above) that questions of the substantive admissibility of a claim, though 'preliminary' questions, and such as, if decided in a certain way, will preclude any decision on the 'ultimate' merits, are questions appertaining to the merits of the claim in the sense that they are not jurisdictional issues. It may be said, therefore, that there are both questions of substantive or ultimate merits, and 'preliminary' questions of merits, such as questions of admissibility. But it may not always be easy to classify a particular question. For instance, the defence to a claim made on behalf of a private person that he has not got the nationality of the claiming government is a clear question of admissibility. But suppose it were a claim in respect of an alleged breach of diplomatic privilege, the defences might be (a) that the act did not take place as stated; (b) that even if it did, it would not have involved a breach of diplomatic privilege; (c) that in any case the *de cuius* did not have diplomatic status and did not have any right to diplomatic privilege. Of these, the first two are clearly questions of substantive merits. The third might be regarded as a preliminary question of merits though this is not entirely certain. It is in a sense no more preliminary than the first question. In any case it is not a question of *admissibility* such as is raised by the nationality issue in an ordinary diplomatic claim on behalf of an individual.

(c)—the obligation to arbitrate, which is what it did decide—it also thought it was deciding issue (b)—the substantive jurisdiction of the eventual arbitral Commission. In the light of the above analysis, it is evident that the United Kingdom Government was arguing issue (b) in the *Ambatielos* case, whereas the Greek Government was arguing issue (c). The United Kingdom contended that since the Court, in the first phase of the case, had assumed the task of interpreting the 1926 Declaration it ought to *interpret* it, and that this involved deciding more than simply whether the case ought to go to the Commission (issue (c))—that it also involved deciding whether, if it did go there, the Commission would have jurisdiction to determine it, i.e. whether the claim fell within the class of case covered by the treaty (issue (b)), this being precisely the question involved by the 1926 Declaration, which the Court had to interpret. This was also the view taken by the four jointly dissenting Judges in that phase of the case.¹ It is equally evident, on the other hand, that the Greek Government were only arguing issue (c); and that the Court, whether or not it so intended,² only decided issue (c)—for, as has been seen, whatever the Court may have said as to the criterion it was applying, it did not in fact go into any of the arguments, either for or against the view that the claim was based on the relevant treaty; it merely stated these arguments, and then concluded that as the parties were at variance as to whether the claim was or was not so based, there was an issue to go to the Commission, and the parties were obliged to have recourse to it. This was a purely issue (c) decision. It is further evident that the only thing which rendered such a decision possible—if it may also have been what rendered the decision correct in the circumstances—was the fact that the Commission had not yet been set up; for if it had already been constituted, then an issue (c) decision—i.e. that the parties must have recourse to the Commission—would have been meaningless, since the parties would already have had

¹ See section (III) (3) (c) (ii) below.

² It is worth noticing that although there are several passages in the Judgment (see above, *passim*) from which it might be inferred that the Court intended to determine, or thought it was determining, the substantive competence of the Commission, it carefully refrained from saying so in terms. In both phases of the case, the operative phraseology employed had reference to the question of recourse, or obligation to submit, to arbitration: thus (in the first phase of the case)—‘it lies with the Court to decide . . . whether there should be a reference to a Commission of Arbitration’ (Judgment, p. 45); ‘finds that it has jurisdiction to decide whether the United Kingdom is under an obligation to submit to arbitration . . .’ (p. 46); and in the second phase—‘The question now before the Court whether the United Kingdom is under an obligation to accept arbitration of the difference . . . concerning . . .’, &c. (Judgment, p. 14); ‘. . . to decide whether the United Kingdom is obliged to accept arbitration, as requested by Greece’ (p. 15); ‘whether . . . there is an obligation binding the United Kingdom to accept arbitration’ (p. 16); ‘For the purpose of determining the obligation of the United Kingdom to accept arbitration . . .’ (p. 17); ‘Accordingly the Court must hold that the United Kingdom is under an obligation to co-operate with Greece in constituting the Commission of Arbitration . . .’ (p. 22; author’s italics); ‘finds that the United Kingdom is under an obligation to submit to arbitration . . . the difference as to the validity . . . of the *Ambatielos* claim’ (p. 23).

recourse to the Commission.¹ The only decision that could have had any meaning in that situation would have been an issue (*b*) decision, relating to the substantive jurisdiction of the Commission. Had the Commission already been set up therefore,² the Court (having reached the conclusion it did in the first phase of the case) would not have been able to escape what it was able to avoid in the second phase of the case, namely, determining the substantive jurisdiction of the Commission—i.e. pronouncing on whether the claim was substantively based on the relevant treaty, instead of merely deciding that there were grounds for regarding the parties as effectively at variance over that. The Court would therefore have had to go into the merits of the parties' arguments for and against the view that the claim was based on the Treaty, which actually it never did. It is submitted that the decision of the Court—though defective in so far as it failed to furnish any substantive interpretation of the 1926 Declaration (in the absence of which it could not really be said that the Declaration had been interpreted at all)³ was correct as a matter of procedure and propriety, given that the Commission had not yet been constituted; that a finding that the tribunal ought to be constituted in order to decide (*inter alia*) whether it had jurisdiction or not (the parties being clearly in dispute about that) would meet the immediate exigencies of the situation; and that by this means (and by this means only) could any prejudging of the substantive jurisdiction of the Commission be avoided. But it was owing to its decision in the first phase of the case that the Court found itself faced with the unfortunate choice of either having to decline to carry out the substance of an interpretative task which it had previously, and in the teeth of strong jurisdictional objection from one of the parties, decided it ought to carry out, contenting itself with the *superficies* of doing so; or else of prejudging the substantive jurisdiction of another tribunal which, according to normal principles, ought to be allowed to determine for itself any question relating to that jurisdiction.⁴ By doing the latter the Court would, in its own language, have been 'encroach[ing] upon the jurisdiction of the Commission' (which included

¹ And equally so in a different sense if the finding had been that the parties were *not* obliged to have recourse to the tribunal—for since they would already have done so, such a finding would normally (even if perhaps not always necessarily) be tantamount to a negative determination of the tribunal's substantive jurisdiction.

² It is no doubt very unlikely, if a tribunal has already been set up, or is already in existence as a standing tribunal, that questions relating to its competence and jurisdiction will find their way to any other tribunal; but it is not theoretically impossible—see Verzijl, *loc. cit.* in n. 4, p. 23, above, at p. 75.

³ This was the view taken by the dissenting Judges in the second phase of the case, who considered that the task of interpretation assumed by the Court in the first phase, necessarily involved a *substantive* decision as to whether the conditions specified in the joint Anglo-Greek Declaration of 1926 as giving rise to the obligation to arbitrate actually existed or not; and that this involved deciding (*inter alia*) whether the subject-matter of the claim fell within at least the *class* of subject-matter covered by the relevant treaty—see section (III) (3) (c) (ii) below.

⁴ And also for very good reasons of a practical character—see subsection (a) (iii) above.

the *compétence de la compétence*), and would have 'substitute[d] itself for the Commission', just as effectively as if it had entered into and pronounced upon the merits.

(e) *Lessons of the Ambatielos case.* The *Ambatielos* case is a warning as to the dangers and difficulties that are liable to arise when one international tribunal pronounces, or may be held to have pronounced, on the substantive¹ jurisdiction of another, before which the merits of the case will fall to be heard, if jurisdiction exists. Given the paramount importance of the normal principle that the determination of any tribunal's substantive jurisdiction is a matter for that tribunal itself, and the prejudice that may be caused to the parties by departing from that principle—it is submitted—(see subsection (a) (iii) above) that even if some other tribunal has in strict law the actual competence to determine the jurisdictional issue, it ought to be guided, as a matter of propriety, by some such rules as the following:

- (i) Whether the tribunal whose task it will be to determine the merits, if competent to do so, has already been constituted or not, other tribunals (even if they strictly have jurisdiction to do so) should normally, and in the absence of very exceptional circumstances, decline to pronounce on the substantive jurisdiction or competence of that tribunal, or on any other jurisdictional question (such as the jurisdiction to prescribe interim or provisional measures) which it is primarily for that tribunal itself to determine, unless
 - (a) in the exercise of an *appellate* jurisdiction based on the consent of the parties;
 - (b) in pursuance of a clear mandate from the parties to do so, which should normally be express and direct, and not be derived by an indirect process of inference or reference.²
- (ii) Where, as will normally be the case, the tribunal competent (if any tribunal is competent) to hear the merits, has *not* yet been constituted, there is no objection to other tribunals (if possessed of jurisdiction to do so) determining, not the substantive jurisdiction of the tribunal concerned, but the question whether the parties are obliged to set it up, and to refer to it the question of its substantive jurisdiction, if disputed. In so doing however, it should be made clear in terms that what is being determined is solely the question of the obligation to constitute and have recourse to the tribunal, and not the

¹ See subsection (d) (i) above.

² By the term 'reference' is meant the process by which a meaning is ascribed to one international instrument in terms of another—i.e. in the context, if the instrument is interpreted as involving an agreement to accept the jurisdiction of a certain tribunal for a certain purpose, by deeming the provisions of another instrument to be part of it; or by the notional incorporation in it of provisions of other instruments *via* some general formula such as a most-favoured-nation clause—see section (III) (3) below.

question whether, when the case is referred to it, the tribunal will have substantive jurisdiction to hear and determine it.¹

The effect of these rules would be that, where the tribunal had already been constituted, other tribunals would normally decline to determine any issue respecting its jurisdiction, whether substantive or other; and that where it had not been constituted, any determination by another tribunal would be confined to the simple question of the initial obligation to set up the specified tribunal. Tribunals following these rules would, it is submitted, be acting in a manner entirely consistent with the actual decision in the second phase of the *Ambatielos* case (whatever the language used in certain passages in the Judgment), and with the view expressed by the Court in the *Peace Treaties* case and quoted on page 41 above.

(4) *General task of a tribunal called upon to decide the substantive jurisdiction of another*

It has been seen in the preceding subsections that a determination by one tribunal of the substantive jurisdiction of another is open to considerable objection, except in unusual circumstances, or by way of appeal in the rare cases in which this can happen internationally, or upon a clear and express mandate from the parties. It has also been seen that in the *Ambatielos* case, the better view seems to be that the Court did not decide any question relating to the substantive jurisdiction of the eventual arbitral Commission, but merely the preliminary jurisdictional issue of whether the Commission must be constituted, and recourse to it be had for the settlement of all points at issue in the case, including the substantive issue of jurisdiction,² and that in consequence the parties were free to raise this latter question before the Commission—though they did not in fact do so. It seems evident, however, that if one tribunal does hold that it is clearly entitled, or obliged, or that it ought to interpret a treaty or other international instrument in such a way as to determine whether, on the basis of that instrument, another tribunal is invested with substantive jurisdiction with reference to a certain dispute, so as to hear and determine its merits, then it will not be sufficient to do what the Court (though, as has been seen, with another and an understandable object³) did in the second phase of the *Ambatielos* case, namely, simply to register the existence of a difference of view between the parties as to whether substantive jurisdiction on the basis

¹ This is the point which, despite the language of the Court quoted in n. 2, p. 59, was never made fully clear in the *Ambatielos* case (see Professor Verzijl's article, n. 4, p. 32, above).

² The sense in which this is used herein, as contrasted with preliminary questions of jurisdiction, has been indicated in subsection (3) (d) (i) above.

³ That is, given the dilemma in which the Court found itself as the result of its decision in the first phase of the case—see subsection (3) (a) *et seq.* above, *passim*. It is of course far from clear that the Court was actually conscious of the dilemma.

of the instrument concerned exists—for to do that is not to determine whether it in fact exists or not. For this reason a number of the Judges in the *Ambatielos* case considered that, the question being whether a given dispute was based on a certain treaty, it was not enough that one of the parties invoked provisions of the treaty, and alleged with some show of arguability or defensibility that breaches of these had occurred, while the other party denied not only these specific allegations, but also the relevance of the treaty provisions. It was necessary in their view to go further than this, and to examine the substantive question (which nevertheless remained a jurisdictional one) of the real relevance of the treaty to the type of claim involved. They took this view on the ground that since the Court had, in the first phase of the case, assumed the task of interpreting the 1926 Declaration, it must interpret it, and not merely register the existence of differences of view as to its interpretation. In the first phase of the case, certain Judges implicitly took the same view, but in a slightly different context. In other words, they considered that the fact that the Court would have to interpret the Declaration, if it held itself to have jurisdiction to do so, and would thereby have to go into matters that fell properly within the sphere of the eventual arbitral Commission, if and when set up, was a strong reason amongst others for not undertaking the task of interpretation at all, and therefore for finding against the Court's competence to do so. Thus Judge Klaestad said (*I.C.J.*, 1952, 82):

'The Declaration contains various conditions for the submission of a dispute to that Commission. The claim must be "based on the provisions of the Anglo-Greek Commercial Treaty of 1886". It must be made "on behalf of private persons". The difference must have arisen "between our two Governments". It must relate "to the validity of such claims".

'Before the Court could decide whether the United Kingdom Government is under an obligation to submit the dispute to the Arbitral Commission, it would have to determine the conditions prescribed for such a submission and to ascertain whether these conditions are fulfilled.'

Similarly, Judge Zoričić said (*ibid.*, 78-79):

'Only if the Court were convinced that the conditions of the Declaration had really been fulfilled would it be possible for it to refer the case to the arbitral commission of arbitration provided for, as a special arbitration, for the sole purpose of determining the validity of the claim.'

In the second phase of the case, the four jointly dissenting Judges¹ put the point very clearly. After stating that, having been required by the Greek application 'to decide whether the United Kingdom is under an obligation to submit [the dispute] to arbitration', the Court 'must for this purpose

¹ McNair, Basdevant, Klaestad and Read.

examine and take into account all legal factors which it deems relevant', the jointly dissenting Judges continued (*I.C.J.*, 1953, 26):

'The Court is called upon to say whether or not there exists an obligation to set up a Commission of Arbitration whose task it would then be to decide as to the validity of the Ambatielos claim. An affirmative reply to this question can be given only if the existence of this obligation can be established on a basis of law. Unless this can be established, it does not appear to us to be possible to give an affirmative answer to the question which the Court is required to decide. It is therefore necessary to examine all the factors susceptible of affecting the answer to be given to this question. It is only after such an examination, and in the light of what may emerge from it, that it will be possible to decide whether a Commission of Arbitration should be set up. It was in this way that the Court considered that the respective functions should be divided in a case—the *Interpretation of Peace Treaties*—which, apart from the fact that the Court had there before it a request for an advisory opinion, had much in common with the present case.'

After expanding this point, the dissenting Judges went on (*ibid.*, 27–28):

'By the Declaration of 1926, the United Kingdom consented to the submission to arbitration of any difference with the Hellenic Government "as to the validity" of "claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886". On the question whether this provision is applicable to the "difference as to the validity of the Ambatielos claim", the operative part of the Judgment of July 1st, 1952, added the following words: "in so far as this claim is based on the Treaty of 1886". This being the case, it is necessary to consider the meaning, which is in issue between the Parties, of the expression "claims . . . based on the provisions of the Anglo-Greek Commercial Treaty of 1886", an expression which is contained in the Declaration and repeated in the Judgment.

'It is not enough for the Hellenic Government to invoke a provision of the Treaty of 1886 for the Ambatielos claim to be considered as "based on the provisions of the . . . Treaty of 1886" within the meaning of the Declaration of 1926. There is nothing in the Declaration which authorizes either Party to the Treaty and Declaration of 1926 to impose its own subjective interpretation of this expression. The Declaration states it objectively, and the Court, which is empowered by Article 29 of the Treaty to interpret the expression, must determine in an objective way whether the claim presented under the Declaration is or is not based on the provisions of the Treaty of 1886.'

The dissenting Judges then made the following important statement of principle (*ibid.*, 29):

'When the Permanent Court and the present Court have had to ascertain whether a dispute fell within the scope of an arbitration clause or a compulsory jurisdiction clause, these Courts have always considered that it was their duty first to determine the categories of disputes to which the clause in question was applicable and then to enquire whether the dispute in question fell within one of these categories.'

The dissenting Judges added that this was a consequence of the principle of consent as the foundation of international arbitral and judicial jurisdiction, and made a number of significant remarks about this principle

(emphasizing the necessity that there should be the reality and not merely the forms of consent).¹ The dissenting Judges continued (*ibid.*, 29):

'It is necessary therefore to examine the matter and, without prejudging the validity of the Ambatielos claim, to ascertain what claims the Declaration of 1926 was intended to refer to and whether the Ambatielos claim falls within the category of claims so determined.'

After referring to the principle of interpretation according to the 'natural and ordinary meaning' of the terms used,² the dissenting Judges then stated that the natural and ordinary meaning of the words 'based on the provisions of the . . . Treaty of 1886' was 'limited to claims whose legal support is found in the provisions of the Treaty', and 'in our opinion, *excludes claims whose support must be sought elsewhere*'³ (*italics added*). They continued (*ibid.*, 30):

'The Declaration begins with a clause whose purpose is to keep alive, in spite of the lapse of the Treaty of 1886, claims on behalf of private persons based on the provisions of that Treaty. This clause can only have a meaning, and can only have effect, in respect of claims legally based on the Treaty of 1886. It cannot be extended to cover claims in respect of which those provisions might be invoked without being really applicable. It was in the nature of things that this saving clause could only safeguard claims that had a legal basis in the Treaty of 1886. The arbitration clause in the Declaration of 1926 mentions expressly the claims referred to in the saving clause. It cannot extend to other claims.'

After further observations implying the need for a real and not merely notional consent by the parties to the exercise of any international jurisdiction, the dissenting Judges then concluded (*ibid.*):

'In order to determine whether the arbitration clause in the Declaration of 1926 should be applied in the present case, we must ascertain whether the difference under consideration falls within the category of differences which the Parties have agreed to submit to arbitration.'

and finally (*ibid.*, 31):

'We therefore have to consider whether the Ambatielos claim falls within the framework of the Treaty of 1886. In order to do this, it is necessary to examine the claim as it has been put forward, without enquiring whether the facts alleged are true or not, and to consider the provisions of the Treaty of 1886 which the Hellenic Government has invoked.'

After this, the dissenting Judges went into the substance of the question, and in effect came to the conclusion that the claim, according to its real

¹ These remarks are considered in section (III) (3) (c) (ii) below.

² See the present writer's articles on treaty interpretation in the light of the Court's work in this *Year Book*, 28 (1951), pp. 9-17; and 33 (1957), pp. 210-20.

³ This was a clear reference to the United Kingdom contention that the claim, which was in the nature of a claim for denial of justice, had a general international law not a commercial treaty basis.

character, was based on the general rules of international law and not the provisions of the Treaty.¹ In view of this they gave as their final conclusion (*ibid.*, 35):

‘For these reasons, we consider that the Ambatielos claim does not fall within the category of claims in respect of which the United Kingdom has agreed to arbitration by the Declaration of 1926. Consequently the United Kingdom, in our opinion, is not under an obligation to submit this claim to the arbitral procedure provided for in that Declaration.’

It will be seen that in this last passage, stress was again laid on the question whether the United Kingdom had really *agreed* to the arbitration of this claim. The important general question of consent as the foundation of international jurisdiction and of what amounts to consent for this purpose, must now be considered.

(III) THE PRINCIPLE OF CONSENT

(1) *The principle stated—consent the essential basis of international jurisdiction*

The principle of consent as the one essential, but also, normally, all sufficient basis of international jurisdiction, has, as Rosenne says, ‘historical origins deriving from the beginnings of modern international law’.² This principle obviously applies primarily and directly in the field of contentious disputes. But it is also not without its application in that of the advisory jurisdiction of the International Court. In the first place, by their membership of the United Nations and other international organs or organizations³ in respect of which this jurisdiction is exerciseable, the States concerned have in effect given a general consent to its exercise in principle. Secondly, the Court, and its predecessor the Permanent Court, have shown themselves far from insensible to the danger and undesirability of indirectly impleading States without their specific consent in that type of case in which the request for an advisory opinion involves issues which are basically litigious in character, the subject of an actual dispute between States, but where, if the proceedings were contentious and not advisory, the Court, for lack of the necessary consents, would have no jurisdiction. In such cases, the Court has always given careful consideration to the

¹ The general nature of this view is well illustrated by the following passage from p. 34 of the Report, where the dissenting Judges said that: ‘In fact, when the Hellenic Government complains that the executive or judicial authorities of the United Kingdom have not acted according to the requirements of the proper administration of justice, it is alleging a violation of general international law. Can such a claim be considered to be based on a provision of the Treaty of 1886?’; and see further section (III) (3) (c) (ii) below.

² *Op. cit.*, in n. 2, p. 8, above, at p. 260.

³ Some of the Specialized Agencies such as U.N.E.S.C.O. are (under agreements with the United Nations, and by an authorization of the Assembly in accordance with Article 96, paragraph 2, of the Charter) empowered to request advisory opinions of the Court—see the *I.L.O. Administrative Tribunal (U.N.E.S.C.O.)* case (*I.C.J.*, 1956, 77, at pp. 83–84); and see n. 1, p. 142, below.

question how far, even if it is fully possessed of jurisdiction to comply with the request for an advisory opinion, it ought, as a matter of propriety, to do so, if this would in effect mean making a judicial pronouncement¹ on a matter thus at issue between two States. The *Eastern Carelia* case² was a well-known instance of the Permanent Court declining on these grounds to give an opinion, and in the *Peace Treaties* case the present Court, though it did not decline to give an opinion, gave the point very full consideration.³ As to the application in contentious cases of the principle of the consent of the parties as the basis of jurisdiction, there is no room for doubt. In the period covered by the 1948-51 cycle of this series, this principle was emphatically affirmed by the Court in the *Peace Treaties* case, when it said that 'The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases.'⁴ In the period under review, this principle, which is reflected in paragraph 1 of Article 36 of the Statute,⁵ was equally affirmed and acted upon by the Court; and in all the three cases⁶ in which the question of jurisdiction specifically arose, the issue was whether or not, in the circumstances, the consent of both parties had been given to the exercise of jurisdiction by the Court. In the *Anglo-Iranian Oil* case the Court (*I.C.J.*, 1952, 103) referred to

'... the principle that the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the Parties. Unless the Parties have conferred jurisdiction on the Court in accordance with Article 36 [*sc.* of the Statute], the Court lacks jurisdiction.'

In the first phase of the *Ambatielos* case also, the Court, after referring to doubts as to the existence of an 'unequivocal agreement between the Parties' on a certain jurisdictional issue, went on to say (*I.C.J.*, 1952, 38) that it had no doubt that

'... in the absence of a clear agreement between the Parties in this respect, the Court has no jurisdiction to go into ... the merits of the present case. ...'

Similarly, in the second phase of the case, the Court said (*I.C.J.*, 1953, 44) that the function it was carrying out in that case⁷ did not involve departing from

'... the principle, which is well established in international law, and accepted by its

¹ Being an advisory opinion rendered to the United Nations or other international organization, it would not be a *decision* of the actual dispute or directly bind the parties.

² *P.C.I.J.*, Series B, No. 5, pp. 7-9.

³ For a discussion of this, see the present writer's article in this *Year Book*, 29 (1952), pp. 51-52; and see also further in the section on advisory opinions below—§ 3, subsections (i) and (ii).

⁴ *I.C.J.*, 1950, 71.

⁵ 'The jurisdiction of the Court comprises all cases which the parties refer to it, and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.'

⁶ They were the *Anglo-Iranian Oil*, *Ambatielos*, and *Nottebohm* (Jurisdiction) cases.

⁷ i.e. to decide whether the parties were under an obligation to submit a certain dispute to arbitration.

own jurisprudence¹ as well as that of the Permanent Court of International Justice, that a State may not be compelled to submit its disputes to arbitration without its consent.'

In this passage, the Court was intentionally echoing the classic statement of the principle given by the Permanent Court in the *Eastern Carelia* case when it said 'It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement'²—just as in the passage quoted above from the *Anglo-Iranian Oil* case, the Court was reflecting the statement of the Permanent Court in the *Minority Schools* (Upper Silesia) case to the effect that 'The Court's jurisdiction depends on the will of the Parties'.³ Equally in the first phase of the *Nottebohm* case, the Court (*I.C.J.*, 1953, 103) said:

Article 36 [sc. of the Statute] determines the cases in respect of which the Court shall have jurisdiction. It indicates that the Court can deal with cases referred to it by agreement of the parties.

Individual Judges also, delivering separate or (though not on this point) dissenting opinions, emphatically endorsed the principle. Thus, in the *Anglo-Iranian Oil* case, Judge Hackworth said (*I.C.J.*, 1952, 139) that 'One cannot dispute the fact that the jurisdiction of the Court is a limited one. Acceptance of jurisdiction by States is a purely voluntary⁴ act on their part'—and Judge Read (*ibid.* 145) referred to 'The fact that jurisdiction depends on the will of the parties. . . .' Lord McNair, in the same case, when saying (*ibid.*, 116) that 'The Court . . . must be satisfied that any State which is brought before it . . . has consented to the jurisdiction', quoted in support a dictum of the Permanent Court in the *Chorzów Factory* case (Jurisdiction) which was also clearly reflected in what Judge Hackworth said. According to this *dictum*, ' . . . the Court's jurisdiction is always a limited one, existing only in so far as States have accepted it. . . .'⁵ A reflection of this can equally be seen in the statement made in the joint dissenting opinion of Judges Winiarski and Badawi in the first phase of the *Anglo-Iranian Oil* case (Interim Measures) to the effect (*I.C.J.*, 1951, 97) that 'In international law it is the consent of the parties which confers jurisdiction on the Court; the Court has jurisdiction only in so far as that jurisdiction has been accepted by the parties.' In the first phase of the *Ambatielos* case, Judge Basdevant also referred to the constant nature of the juris-

¹ See the article referred to in n. 3, p. 67, above, pp. 42-43.

² Series B, No. 5, at p. 27.

³ Series A, No. 15, at p. 22.

⁴ But it need not, of course, be voluntary in the sense of *ad hoc* to the actual dispute, if jurisdiction in respect of the class of dispute to which the case belongs has been accepted in advance—see subsection (2) below.

⁵ Series A, No. 9, at p. 32.

prudence on this point, stating (*I.C.J.*, 1952, 66) that 'In accordance with the principle laid down by the Court in other cases (*I.C.J. Reports*, 1949, pp. 177-178, and 1950, p. 71)¹ which is not disputed in the present case, the jurisdiction of the Court depends on the consent of the States parties to the dispute'; and Judge Zoričić (*ibid.*, 75) quoted the Permanent Court as saying: '... the Court's aim is always to ascertain whether an intention on the part of the parties exists to confer jurisdiction upon it'.² In the second phase of the *Ambatielos* case, the four jointly dissenting Judges,³ after quoting the passage from the *Eastern Carelia* case given above,⁴ went on to emphasize the continuity of the jurisprudence involved, saying (*I.C.J.*, 1953, 28) that

'This principle was thereafter applied on a number of occasions by the Permanent Court, in particular in the cases concerning the *Mavrommatis Palestine Concessions*, *German Interests in Polish Upper Silesia*, *the Factory at Chorzów*, and the *Rights of Minorities in Upper Silesia*. That Court applied the principle with particular care when it had to decide the scope of an exception *ratione temporis* contained in a compulsory jurisdiction clause invoked before it in the *Phosphates in Morocco* case. The principle was also applied by the International Court of Justice in the *Corfu Channel* case, the *Interpretation of Peace Treaties* case and the *Anglo-Iranian Oil Company* case.'

The same four Judges had made additional observations on the subject which will more conveniently be considered below in connexion with the subject of 'reality' of consent. But one further point brought out in their opinion may be noticed here, namely, that when the consent of the 'parties' is referred to, what is normally at stake (except where the 'reciprocity' question arises with reference to the Court's optional clause jurisdiction)⁵ is the consent of the *respondent*, since *ex hypothesi* the applicant must be a consenting party. The four-Judge opinion cited and quoted from the *Mavrommatis* case, in which the Permanent Court said that '... the Court, bearing in mind the fact that its jurisdiction is limited, that it is invariably based on the consent of the respondent and only exists in so far as this consent has been given . . .',⁶ a passage which affords further evidence of the continuity, not only of the jurisprudence on this matter, but of much of the phraseology in which it is expressed.⁷

¹ The *Corfu* and *Peace Treaties (First Phase)* cases, respectively.

² Cited in Judge Zoričić's opinion, according to the Court's report, as Series A, No. 8, p. 32; but it is in fact No. 9 (the *Chorzów Factory* case).

³ McNair, Basdevant, Klaestad and Read.

⁴ See reference in n. 2, p. 68, above.

⁵ Because the applicant cannot compel the respondent to answer before the Court merely on the ground that the respondent's declaration covers the case. The applicant's own declaration must cover it also, or the requirement of reciprocity (usually expressly reserved, but probably applying in any event, unless expressly excluded—see n. 2, p. 71, below) will not be satisfied.

⁶ Series A, No. 2, at p. 16.

⁷ Compare, for instance, the language used in the *Chorzów Factory* case, and by Judge Hackworth in the *Peace Treaties* case, as quoted above.

(2) *Character, manner and form of consent, and the various jurisdictions resulting therefrom*

The character and form of the consent given, determines the character of the jurisdiction of the International Court, and to some extent the form in which it is exercised. This is, of course, equally true of other international tribunals, but the matter is best discussed in relation to the Court because the full range of questions only arises with reference to standing tribunals, and in particular the Court.¹ The points involved turn on whether the consent given is *ad hoc* or general, and on whether it is express or implied.

(a) *Consent may be given ante hoc, ad hoc, or post hoc.* Rosenne lists the jurisdiction of the Court as being of four main² kinds: consensual, conventional, prorogated and compulsory³—a grouping which is convenient as a matter of description, and because each kind involves distinct peculiarities; but it is not an entirely logical grouping: for instance, the compulsory jurisdiction is in a certain sense conventional, while the conventional jurisdiction is certainly compulsory. Also, of course, conventional, compulsory and prorogated jurisdictions are all, in the last resort, cases of consensual jurisdiction: only the manner of consent differs. It is therefore perhaps technically preferable to consider the matter from the point of view of the stage at which consent is given—whether in advance of the dispute arising (under a treaty or ‘Optional Clause’ declaration); at the time when it arises (or more accurately at the moment of its reference to the Court)—i.e. *ad hoc*; and, in the case of the respondent State’s consent, after reference of the matter to the Court—*forum prorogatum*.⁴ In the case of the first of these categories, however, it would perhaps be more accurate still to say ‘in advance of the reference of the case to the Court’. The phrase ‘accept the Court’s jurisdiction generally and in advance’ is frequently used, and is satisfactory when the acceptance is either quite general, or relates to a particular class of disputes of which no actual instance yet exists so far as the accepting State is concerned. However, it is perfectly possible to accept the jurisdiction in *advance*, but not in a *general* way, i.e. in relation to a specific existing dispute which the other party has not been willing to refer to arbitration or adjudication.⁵ In that case, the consent is given not in

¹ Because of the optional clause jurisdiction.

² There is also its incidental jurisdiction—i.e. ancillary to possessing a basic jurisdiction in the case, e.g. to deal with counterclaims, interpret its own judgments, &c.

³ See *op. cit.*, in n. 2, p. 8, above, Chapter X, parts A–D.

⁴ In the Rosenne terminology, consent at the first stage would involve conventional or compulsory jurisdiction, according to circumstances; at the second stage, consensual jurisdiction; and at the third, prorogated. It is suggested that some possibility of confusion might be avoided by adopting the term ‘treaty’ jurisdiction for ‘conventional’; ‘Optional Clause’ jurisdiction for ‘compulsory’; and ‘jurisdiction by consent *ad hoc*’ for consensual.

⁵ This is in fact what occurred during the period of validity (1946–56) of the standing declara-

advance of the dispute arising, but in advance of any eventual reference of it to the Court should the other party accept the offer involved. Should that occur, something analogous to prorogated jurisdiction comes about, in the sense that a standing offer to go to the Court is subsequently closed with, and thus jurisdiction is conferred on the Court. However, a significant reversal of roles would take place. In true prorogated jurisdiction, it is the plaintiff State who *invokes* the jurisdiction of the Court by seising it as applicant, and the defendant State which subsequently, either expressly or by appearance or other form of submission, accepts as respondent. But a standing acceptance of the Court's jurisdiction, given in relation to a *particular* dispute, but in advance (or in the absence) of any attempt actually to seize the Court, might be given by either the claimant or the defendant State. Even if given by the claimant State, it might nevertheless be the defendant State which, in the immediate and proximate sense, invoked the jurisdiction of the Court by actually filing an application, and which would then become the applicant, putting the claimant nominally in the position of respondent.¹ Equally, if the defendant State made the declaration of prior acceptance, there would, from the standpoint of prorogated jurisdiction, be the anomaly that instead of jurisdiction being completed by a *subsequent* submission on the part of the defendant or respondent State to an invocation of the jurisdiction by the plaintiff or applicant State, this submission would in principle have been made in advance. These anomalies suggest that the case of an advance declaration of acceptance made with reference to a particular dispute, is best not regarded as a special case of prorogated jurisdiction, but as a special case of compulsory jurisdiction, especially as in many if not most cases it may not be possible, or may not be sufficient, for the other party to the dispute simply to have recourse to the Court on the strength of the standing declaration of its adversary: it may itself have to make a corresponding declaration of acceptance for the purposes of the particular dispute.² However that may be, the Court indicated very clearly

tion made by the United Kingdom accepting the jurisdiction of the Court for all legal disputes relating to any treaty about the boundaries of British Honduras. After this declaration had been in force for ten years however, without the offer having been taken up, it was allowed to expire without renewal.

¹ This could, actually, also occur in an ordinary case of *forum prorogatum*, if the *defendant* State took the initiative in seising the Court—e.g. if a claim was made against it which it rejected but with an offer to submit the matter to arbitration or adjudication, and the offer was not taken up. It may nevertheless be to the advantage of the defendant to seek to dispose of the matter finally by seising the Court and awaiting a response from the claimant State. In that case, the defendant becomes the applicant State, and the plaintiff State (if it appears) the respondent. In some cases a dispute does not clearly put either party in the position of plaintiff or defendant (e.g. the *Minquiers* case—see this *Year Book*, 32 (1955-6), p. 20 et seq.). In such cases, if there is no agreement or other obligation to refer to the Court, either party might, by seising the Court, attempt to found jurisdiction by *forum prorogatum*.

² In principle this will in fact, so far as the International Court is concerned, always be the case, because of the words in paragraph 2 of Article 36 itself, to the effect that States parties to

in a general way the three main methods by which, apart from the case of *forum prorogatum* (*stricto sensu*), it may be invested with jurisdiction, namely, by a special agreement between the parties (consent *ad hoc*); by mutual declarations under paragraph 2 of Article 36 of the Statute (optional clause jurisdiction); or under a treaty by which both parties are bound, containing a provision for the submission of disputes to the Court (conventional jurisdiction). In both the last two cases consent is given *ante hoc*. Stating this position, the Court, in the first phase of the *Ambatielos* case, said (*I.C.J.*, 1952, 39):

'Greece has not accepted the compulsory jurisdiction of the Court under Article 36 (2) of its Statute and therefore can invoke the jurisdiction of the Court only under Article 36 (1), by virtue of a special agreement or the provisions of a treaty.'¹

Later, the Court, after deciding that a certain joint Anglo-Greek Declaration was part of an Anglo-Greek Treaty which contained a provision for the reference to the Court of any dispute concerning the interpretation or application of its provisions, went on (*ibid.*, 44):

'Consequently [italics added], this Court has jurisdiction to decide any dispute as to the interpretation or application of the Declaration. . . .'

The same three sources of jurisdiction were equally clearly indicated by Judge Hackworth in the *Anglo-Iranian Oil* case, when he said (*I.C.J.*, 1952, 139) that from the principle of consent

' . . . it necessarily follows that, unless a State has by special agreement, by treaty or convention, or by a declaration made under the Optional Clause of Article 36, paragraph 2, of the Statute, accepted jurisdiction, the Court is without jurisdiction.'

the Statute may at any time accept the Court's compulsory jurisdiction 'in relation to any other State accepting the same obligation'. Therefore, even in the absence of any express reservation of reciprocity in the relevant declaration, this condition would apply in virtue of the Statute, and the declaration could not be invoked in order to found jurisdiction except by a State having also made a declaration accepting the Court's compulsory jurisdiction, at least in relation to the particular dispute. A few States have, however, gone farther than merely not to *specify* reciprocity in their declarations, and have expressly stated that they accept the Court's compulsory jurisdiction 'unconditionally'. But does this suffice to render unnecessary a condition required by the Statute itself? It may be that the State making a declaration in these terms would not take (or might perhaps be precluded from itself taking) any point about absence of reciprocity; but the Court could do so *proprio motu*. However, it is by no means certain that the use of the word 'unconditionally' is intended to do away with the need for reciprocity, or necessarily has that effect.

¹ This passage seems to imply that had Greece accepted the compulsory jurisdiction, this would have sufficed, since the United Kingdom had been a party to the Optional Clause jurisdiction from 1929 onwards. However, this is surely not so, for the United Kingdom acceptance only related to disputes arising subsequently to 1929 and having reference to facts or situations subsequent to that date, and both the facts and the dispute in the *Ambatielos* case arose earlier. But for this, the obvious Greek tactic would have been to deposit an acceptance of the Optional Clause jurisdiction simply for the purposes of the particular case, and then to make a unilateral application to the Court invoking the United Kingdom's acceptance, thus avoiding the tortuous procedure of invoking the Court's jurisdiction under the Anglo-Greek Commercial Treaty of 1926 and contending that the instrument really falling to be interpreted, namely the Joint Declaration of 1926, was a part of that Treaty.

(b) *Consent given ante hoc—obligatory jurisdiction.* Consent given *ante hoc* may result from the provisions of a treaty or other international agreement containing a provision for reference to the Court of disputes arising under it (or, so far as other tribunals are concerned, for a reference to arbitration); or, in the case of the Court, it may result from a declaration made under paragraph 2 of Article 36 of the Statute (the 'Optional Clause'). Both are cases of compulsory jurisdiction, even though that term is customarily reserved for the optional clause jurisdiction, because both involve that when a dispute occurs, the obligation to refer it to the Court at the instance of the other party, exists or arises *ipso facto*, and no further or special agreement is necessary to create it. This is the essential feature of compulsory jurisdiction, and both 'treaty' and 'Optional Clause' jurisdiction are instances of it. The pronouncements of the Court and of individual Judges given in the immediately preceding paragraph illustrate this point very well.

(i) *Treaty jurisdiction.* The *Ambatielos* case, the general character of which has already been considered,¹ affords a good illustration of this type of jurisdiction. The Anglo-Greek Commercial Treaty of 1926 provided expressly for a reference to the Court of all disputes as to the interpretation or application 'of any of the provisions of the present Treaty', and it was therefore not questioned by either party that, if a provision of the Treaty was involved, the Court had jurisdiction to interpret it. The point was also clearly stated by the Court itself (*I.C.J.*, 1952, 40):

'It follows . . . that any dispute as to the interpretation or application of any of the provisions of the Treaty of 1926 is referable by either Party to this Court.'

What was in issue was whether the 'provision' involved was a provision of the Treaty. The United Kingdom denied that the joint Anglo-Greek Declaration of 1926, which accompanied but, in the United Kingdom view, did not form part of the Treaty, was a 'provision' of the Treaty. This Declaration dealt with the obligation of the parties to refer to an arbitral Commission disputes about claims 'based on' the provisions of the older Anglo-Greek Commercial Treaty of 1886 replaced by the Treaty of 1926. The United Kingdom contended that the Court, having no jurisdiction to interpret this Declaration because it was not part of the 1926 Treaty, could not determine the question of the arbitrability of the *Ambatielos* claim in virtue of the Declaration. The Court rejected this contention, finding (*ibid.*, 44) that

'... the provisions of the Declaration are provisions of the Treaty within the meaning of Article 29.² Consequently this Court has jurisdiction to decide any dispute as to the

¹ And see also below, subsection (3); and in the author's article in this *Year Book*, 33 (1957), pp. 255-70.

² This was the settlement of disputes article of the Treaty providing for a reference to the former Permanent Court, and hence to the present Court by virtue of Article 37 of the Statute.

interpretation or application of the Declaration and, in a proper case, to adjudge that there should be a reference to a Commission of Arbitration.¹

This last question then formed the subject-matter of the second phase of the case. The process (which was essentially one of treaty interpretation) by which the Court reached the above conclusion has already been fully discussed in a previous article,¹ and its consequences in creating a dilemma for the Court in the second phase of the case have been described in section (II) (3) above. This second phase, however, also involved that the Court, by its decision, gave effect to a 'treaty' basis of jurisdiction, since the Court proceeded to decide that under a treaty instrument, namely, the Anglo-Greek Declaration of 1926, there was an obligation to refer the Ambatielos claim to arbitration. The fact that the Court was not then determining its own jurisdiction, but the existence or otherwise of an obligation to have recourse to another tribunal, obviously made no difference of principle as regards the point now under discussion, namely, the treaty basis of jurisdiction and its obligatory character. As in the first phase of the case, the parties did not question that, if the dispute about the Ambatielos claim came within the terms of the 1926 Declaration, it fell to be determined by a Commission of Arbitration. The issue was whether the dispute was within those terms. In both phases of the case, the processes by which the Court arrived at the conclusion that a treaty obligation to adjudicate or arbitrate a certain matter—or in other words, that jurisdiction had been consented to—involved the use of inferential reasoning and attribution in a sufficiently marked degree to raise the question of the extent of the immediacy and reality a consent ought to have in order to render it susceptible of founding jurisdiction. This question is discussed in subsection (3) below (pp. 86–97).

(ii) *Optional Clause jurisdiction*. This jurisdiction, deriving from the fact that both parties have made declarations under what is usually called the 'Optional Clause' (Article 36, paragraph 2 of the Statute), in such terms as to cover the dispute brought before the Court, resembles the 'treaty' jurisdiction in being 'compulsory'.² It also enables the matter to be brought before the Court by the unilateral application of either party, and gives the Court jurisdiction *ipso facto* and without any further agreement between, or special (*ad hoc*) consent of, the parties—in this respect equally resembling the treaty jurisdiction in those cases where the Court is the tribunal designated as the treaty tribunal.³ Thus the consequences of the two types

¹ As cited in n. 1, p. 73, above.

² It is, of course, like the 'treaty' jurisdiction, compulsory in the sense that once a dispute of the class covered arises, the jurisdiction of the Court is automatic, and the parties are obliged to submit to it, if either of them invokes it. As this is precisely the situation that each party has, in effect, agreed to be placed in, the jurisdiction is just as much based on consent as if the consent had been given *ad hoc*.

³ Or for that matter if any other *standing* tribunal were designated. The case is otherwise where

of jurisdiction in relation to their effects on the given dispute are very similar, but there are considerable differences between them as to the means by which they are established. The following points may be noticed:

a. Necessity for two declarations still in force at the date of reference to the Court. 'Treaty' jurisdiction results from the parties having become bound by a common instrument; the question whether it does or does not cover the dispute, being governed for each of them by the same criteria, depending on the terms of the instrument. In the case of the Optional Clause jurisdiction, there are a number of different declarations made by the several States accepting that jurisdiction. Each is unilateral in form, and its terms are determined exclusively (of course within the framework of Article 36) by the government making it. These declarations are not treaties, but they give rise to a quasi-treaty situation by creating a network of bilateral relationships between the various declarants. This relationship is normally a latent one; it becomes active only if and when a dispute arises, and the one declarant invokes the declaration of the other (together with its own) as conferring jurisdiction upon the Court. Thus the first requisite is the existence of two declarations of acceptance of the Optional Clause jurisdiction, both of which, as has been seen earlier,¹ must be in force at the time when the application to the Court in virtue of them is made.

b. The declarations must coincide sufficiently for both to cover the dispute. The second main requisite arises from the fact that, unlike the terms of a treaty which, when they govern the matter, do so in a similar and common way for both parties, Optional Clause declarations, except in the rare cases when they embrace all disputes and are also unconditional, vary in their terms, and seldom have precisely the same field of application. They may apply to different classes of disputes, and be subject to different conditions and reservations. Any two declarations normally have at least some common field, but theoretically there might be no common field at all—or, at the other extreme, the field might be wholly common and identical for both. To confer jurisdiction on the Court, the declarations concerned must meet and interlock; and in relation to any given dispute, the Court will only have jurisdiction if the parties' respective declarations (which may be entirely different in other respects) overlap in relation to the subject-matter of the dispute in such a way that the dispute falls within the field of the overlap, and is thus covered by both declarations. As between any two parties to

what is designated is a tribunal to be set up by agreement between the parties (see as to this section (II) (3) (d) above)—unless, of course, the treaty provides some automatic means of setting up the tribunal (e.g. by appointment on the part of some other authority) in the event of the parties failing to agree.

¹ See section (I) (4) above. Here also there is a similarity to the treaty position which, as has been seen (subsection (c) of section (I) (4)), requires that, at the date of reference to the treaty tribunal, the treaty should still be in force and binding on both parties.

the Optional Clause, therefore, the Court's jurisdiction is based on the highest common factor of their respective declarations, and extends to those matters, and those matters only, which are part of that factor. In practice, and except in the case of declarations whose field *ratione materiae*, *ratione personae* and *ratione temporis* is identical, this resolves itself largely into determining which of the two declarations is the more limited in scope, and then deciding whether the case falls within the scope of that declaration. If so, it will *ex hypothesi* also be covered by the other. These various features of the Optional Clause jurisdiction were neatly summarized by the Court in the following passage from the *Anglo-Iranian Oil* case (*I.C.J.*, 1952, 103):

'In the present case the jurisdiction of the Court depends on the Declarations made by the Parties under Article 36, paragraph 2 [of the Statute]. . . . By these Declarations, jurisdiction is conferred on the Court only to the extent to which the two Declarations coincide in conferring it. As the Iranian Declaration is more limited in scope than the United Kingdom Declaration, it is the Iranian Declaration on which the Court must base itself.'

Lord McNair in the same case also made a general statement as to the nature of the Optional Clause jurisdiction as follows (*ibid.*, 116):

'A State, being free either to make a Declaration or not, is entitled, if it decides to make one, to limit the scope of its Declaration in any way it chooses, subject always to reciprocity.¹ Another State seeking to found the jurisdiction of the Court upon it must shew that the Declarations of both States concur in comprising the dispute in question within their scope . . . it is common ground between the Parties that the Iranian Declaration . . . was in force when the United Kingdom filed its Application to the Court. . . . It is also common ground that the present dispute falls within the scope of the United Kingdom's Declaration.'

A further general statement was made by the Court in the *Nottebohm* case (Jurisdiction) when it said (*I.C.J.*, 1952, 122):

'Article 36 determines the cases in respect of which the Court shall have jurisdiction. It indicates that the Court can deal with cases referred to it by agreement of the parties; and it determines the field of application of what has come to be called the compulsory jurisdiction of the Court. The characteristic of this compulsory jurisdiction is that it results from a previous agreement² which makes it possible to seize the Court of a dispute without a Special Agreement, and that in respect of disputes subject to it, the Court may be seized by means of an Application by one of the parties.'

c. The interpretation of Optional Clause declarations. The only other general question relating to the Optional Clause jurisdiction dealt with by the Court

¹ There seems here to be a clear recognition of the basic applicability of the reciprocity requirement irrespective of its specific indication in the declaration concerned—as to this see n. 2, p. 71, above.

² There seems here, incidentally, to be a clear recognition of the quasi-'treaty' or at any rate consensual character of mutually interlocking Optional Clause declarations. It is not entirely easy to reconcile this with the attitude of the Court as to the interpretation of these declarations which is discussed in subparagraph (c) below.

in the period under review was that of the interpretation of Optional Clause declarations, and whether these are to be interpreted according to the same principles as treaties. This matter was considered in an earlier article¹ (as part of the subject of treaty interpretation) on the basis that, although these declarations are unilateral in *form*, they give rise to a 'treaty situation', because, in so far as any two coincide, a contractual relationship is created, involving mutual obligations for the parties. Hence, ordinary canons of treaty interpretation ought, in principle, to apply. This position, it was pointed out in the same article, would not be affected merely by the fact that, in the given case, only one declaration (that which was the more limited in scope) required to be interpreted; for that declaration would itself, to the extent that it covered the dispute, be an element in a contractual situation involving another State. It was, however, also pointed out that in the *Anglo-Iranian Oil* case, the Court, while in general applying ordinary principles of treaty interpretation, seems to have felt that the voluntary and unilateral character of these declarations put them in a special position, in which it was necessary to have particular regard to the known, apparent or probable intentions of the State making the declaration, particularly with reference to any conditions or limitations which that State had placed on the extent of the obligation it was assuming, and that it was necessary to do this even if it involved a departure from what would otherwise have been an applicable rule of interpretation.² Thus, in the *Anglo-Iranian Oil* case, the Court, construing the Iranian declaration, said (*I.C.J.*, 1952, 104) that it could not

'... base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court.'

Then, after referring (*ibid.*, 105) to the argument advanced on behalf of the United Kingdom, that, if interpreted as contended for by Iran, 'the Declaration would contain some superfluous words . . . a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text', the Court continued:

'It may be said that this principle should in general be applied when interpreting the text of a treaty. But the text of the Iranian Declaration is not a treaty text resulting

¹ As cited in n. 1, p. 73, above, at pp. 229-32.

² The Court did not depart from the principle of the 'natural and ordinary meaning' which constitutes the basis of its jurisprudence on treaty interpretation—see the previous articles in this series in this *Year Book*, 28 (1951) and 33 (1957)—for the text concerned was patently ambiguous, and extraneous methods of interpretation were necessary. The Court did, however, more or less deliberately decline to apply what in the articles above referred to has been called 'Major Principle of Treaty Interpretation IV', that of 'Maximum Effectiveness'—for a statement of it see this *Year Book*, 33 (1957), p. 211—by giving the text an interpretation which failed to account for an important word in it (see quotation in n. 2, p. 78, below).

from negotiations between two or more States. It is the result of unilateral drafting by the Government of Iran, which appears to have shown a particular degree of caution when drafting the text of the Declaration. It appears to have inserted, *ex abundanti cautela*, words which, strictly speaking, may seem to have been superfluous. This caution is explained by the special reasons which led the Government of Iran to draft the Declaration in a very restrictive manner.'

On this basis,¹ the Court proceeded to consider and give effect to certain circumstances existing at the time when Iran made its Optional Clause declaration which, in the Court's view, showed that the interpretation which was being put forward by Iran, rather than that contended for by the United Kingdom, was the correct one. This interpretation was accordingly adopted by the Court, even though it meant that an important word in Iran's declaration (important, that is, in the context) was left wholly without effect, so that the text had the same meaning whether it was included or left out.² In his dissenting opinion Judge Read expressed complete disagreement with this approach, saying (*I.C.J.*, 1952, 142):

'I am unable to accept the contention that the principles of international law which govern the interpretation of treaties cannot be applied to the Persian Declaration, because it is unilateral. Admittedly it was drafted unilaterally. On the other hand, it was related, in express terms, to Article 36 of the Statute, and to the declarations of other States which had already deposited, or which might in the future deposit, reciprocal declarations. It was intended to establish legal relationships with such States, consensual in their character, within the régime established by the provisions of Article 36.'

It is submitted that although the Court's attitude may have been justified, this was not because there is any real difference between the principles applicable to the interpretation of treaties proper, and those applicable to

¹ In the passage quoted, it is submitted that the chief stress should be regarded as being laid not on the fact that the declaration was not a *treaty* text, but on the fact that it was not a text 'resulting from negotiations'—see as to this the article cited in n. 1, p. 73, above, at p. 232.

² The relevant words of the Iranian Optional Clause declaration stated that it was made with reference to 'disputes . . . with regard to situations or facts relating . . . to treaties or conventions accepted by Persia [and] subsequent to the ratification of this declaration'. The question at issue was whether the words 'subsequent to the ratification of this declaration' qualified the words 'treaties or conventions accepted by Persia' (as Iran contended, and as the Court found), or whether (as the United Kingdom contended) they qualified the words 'situations or facts'. The situations and facts to which the dispute related did arise subsequently to the ratification of Iran's declaration; but the treaties on which the United Kingdom had to rely were entered into previously. It is evident that according to the interpretation adopted by the Court, relating the words 'subsequent to . . . etc.' to the treaties accepted by Persia, the word 'and' (which has for emphasis been placed in square brackets, but which figured in both the English and the French texts of the declaration) is quite superfluous. The text would have meant exactly the same as the Court found that it meant, if this word had been omitted. Indeed, it would have meant it a great deal more clearly *without* this word, which (if that *was* the meaning) was not only superfluous, but introduced an element of confusion and ambiguity. The United Kingdom contention was that this word must be assumed to have been intended to have some effect. On the Iranian interpretation it had none. The only way in which it could be given a definite effect was if the phrase 'subsequent to . . . etc.' was related to 'situations and facts'. The word 'and' then became not merely relevant but necessary.

the interpretation of unilateral declarations intended to create binding obligations;¹ and that in this respect Judge Read was right.² The justification was, rather, that the provision to be interpreted was a *jurisdictional* one, and because there is need for caution and restraint in construing *all* jurisdictional clauses, whether they figure in a treaty proper or in a declaration made under the Optional Clause. To say this, is quite a different thing from advocating any deliberately 'restrictive' interpretation of such clauses. However, since the issue raised is that of the 'reality' of the consent given, discussion of it is postponed to a later subsection.³

(c) *Consent given ad hoc—the question of form.* It follows automatically from the general principle of consent as the essential requirement for the founding of international jurisdiction, that if such consent is not given *ante hoc* in one of the ways described in the preceding subparagraphs, it must be given *ad hoc* with reference to the particular dispute—unless indeed it is given *post hoc*, thus creating prorogated jurisdiction.⁴ The necessity for such consent, in the absence of any treaty or Optional Clause consent, is implicit in the passages from the Court's judgments in the *Ambatielos* and *Anglo-Iranian Oil* cases quoted at the end of paragraph (III) (2) (a) above. The usual method is by the conclusion between the parties of a special agreement submitting the case to the Court or other tribunal, and an example of such an agreement in the period under review was the *compromis* in the *Minquiers* case, which the parties chose to refer to the Court in this way despite the fact that they had both accepted the Court's Optional Clause jurisdiction.⁵ But, while a special agreement is usually convenient and desirable, both from the parties' point of view and that of the Court (e.g. the special agreement can define the exact issues submitted), it is in no way essential in the case of a standing tribunal such as the Court,⁶ if the parties are agreed to dispense with it. In that case, the

¹ See as to this the present writer's article in this *Year Book*, 33 (1957), pp. 229-32.

² Indeed, as has been seen, the Court, in the passage commented on in n. 2, p. 76, above, itself recognized the consensual and quasi-treaty character of interlocking Optional Clause declarations.

³ See subsection (3) below (pp. 86-97).

⁴ See paragraph (d) below.

⁵ Various motives may cause States to act in this way. They may, for instance, wish to have an agreed definition of the issues to be determined by the Court, or to avoid jurisdictional points which the Court might take *proprio motu* if the case was referred to it by application on the basis of mutual Optional Clause declarations. Moreover, a reference by unilateral application makes one of them plaintiff and the other defendant. In the *Minquiers* case, the parties were agreed that neither of them should ostensibly be placed in either position. In the *Norwegian Fisheries* case, the situation was reversed. The parties were in fact agreed to go to the Court, but it suited them that the case should be brought before the Court by the unilateral application of one of them, on the basis of mutual Optional Clause declarations. There are sometimes domestic reasons why a party may prefer to be taken before the Court rather than be seen to agree to go there. Or again, while agreed to go to the Court, the parties may find it difficult to agree on the exact terms of reference by means of a *compromis*. The issues will then emerge from their arguments.

⁶ But in the case of a reference to arbitration, where the tribunal has to be set up by agreement between the parties, a special agreement will usually be essential.

reference can take place by means of an application on the part of one party, followed by an acceptance of, or submission to, the jurisdiction on the part of the other, either by means of a communication to the Court, or by taking some step in the proceedings such as the appointment of an agent in the case.¹ Sir Hersch Lauterpacht, referring to a case heard before the former Permanent Court,² puts the matter as follows:

‘The Court pointed out once more that its jurisdiction in a particular case is not subordinated to the observance of certain forms such as the conclusion of a special agreement, and that the consent of a State to the submission of a dispute may not only follow from an express declaration, but may also be inferred from acts conclusively establishing it.’³

It should be noticed, however, that cases of this kind, while resembling, are not true cases of prorogated jurisdiction, but of jurisdiction by consent given *ad hoc*, because the whole process takes place on the basis of a *prior* agreement or understanding between the parties as to the steps to be taken⁴—prior, that is, not to the dispute, but to the reference to the Court. Nevertheless, the possibility of creating jurisdiction by successive acts is also the foundation of the jurisdiction by *forum prorogatum*—see next succeeding paragraph.

(d) *Consent given post hoc—prorogated jurisdiction.* According to the Latin meaning of the term *prorogare* (delayed or put off—hence the term ‘prorogued’), prorogated jurisdiction is delayed jurisdiction—not jurisdiction invoked (it is invoked, but it does not then exist), but jurisdiction completed subsequently. It follows that the essence of consent given *post hoc*, and in consequence of prorogated jurisdiction, lies in the absence of any *prior* agreement between the parties, or acceptance by them of the Court’s jurisdiction, not merely in advance of the dispute arising, but even (initially) when it does arise, at any rate so far as one of them is concerned.

(i) *Modus operandi of the jurisdiction by forum prorogatum.* This kind of jurisdiction arises where, there being no basis on which the Court’s compulsory jurisdiction can be invoked, and no *ad hoc* agreement between the parties to have recourse to the Court, one of them nevertheless actually makes an application to the Court, or takes some other step implying consent to, or recognition of, the Court’s jurisdiction in the case, and the other party thereupon decides to accept or submit to the jurisdiction, or can be held to have done so, either by signifying acceptance—whether to the first

¹ That there may be good reasons for adopting this course, is suggested in n. 5, p. 79, above.

² The *Minority Schools (Upper Silesia)* case, Series A, No. 15, at p. 24.

³ Op. cit., in n. 4, p. 10, above, at p. 202.

⁴ The *Norwegian Fisheries* case would have been an example of this, if the parties had not in any event been bound by optional clause declarations that would, if necessary, have covered the case.

party or to the Court—or by taking some step in the proceedings. In the nature of the case, prorogated jurisdiction implies (and cannot operate without) the existence of a standing tribunal, such as the Court, whose jurisdiction can be invoked by one party and completed by the subsequent assent of the other. The prorogated jurisdiction of the Court was largely built up under the régime of the Permanent Court, and, as Rosenne points out,¹ has been rendered possible mainly by three factors, namely, first, the absence of any provision of the Statute or Rules of Court making the validity of a unilateral application to the Court dependent on the simultaneous presentation of evidence of the 'respondent's' consent, which need not therefore then exist or be obtained in advance; secondly and similarly, the absence of any provision requiring any particular form or method of consent—the significance of which is that consent may be inferred from conduct; and lastly, that there is no hard and fast rule as to whether, or in what cases, proceedings must be instituted by special agreement rather than by application—which allows the latter method to be employed even in the absence of agreement between the parties.

(ii) *Instances of jurisdiction by forum prorogatum before the present Court.* In the period covered by the previous cycle of articles in this series, the principle of *forum prorogatum* was applied by the Court in the *Corfu Channel* case, and some account of that was given in an earlier article.² During the period now under review the matter was considered in two or three cases, but only in one does the Court seem to have thought that it was actually exercising jurisdiction on the basis of *forum prorogatum*, and even this is not quite certain. That case was the *Haya de la Torre*, or *Asylum* (Consequential Points) case, in which the Court was asked—not to interpret its Judgment in the main *Asylum* case—(such a request had been the subject of an earlier application, and the Court had automatic jurisdiction under Article 60 of the Statute to accede to it)³—but to indicate in what manner the Judgment ought to be carried out, and what steps the party responsible for doing so ought to take for that purpose—this being a matter on which the parties had not been able to reach any agreement. There being no specific provision of the Statute which authorized the Court to accede to such a request, and in view of the doubt as to whether

¹ Op. cit. in n. 2, p. 8, above, at p. 286.

² This was referred to in the third article in the present series, this *Year Book*, 29 (1952), pp. 43-44. For a much fuller account of the *forum prorogatum* aspect of the case see Lauterpacht (op. cit. in n. 4, p. 10, above, at pp. 103-4) and Rosenne (op. cit. in n. 2, p. 8, above, at pp. 292-4).

³ *Asylum* (Interpretation of Judgment) case, *I.C.J.*, 1950, 395. Under Article 60 of the Statute 'In the event of dispute as to the meaning or scope of [a] judgment, the Court shall construe it upon the request of any party.' However, in the case cited, the Court declined to exercise its jurisdiction under Article 60, on the ground that there was no evidence of any dispute between the parties as to the interpretation of its Judgment in the main *Asylum* case.

it could be regarded as an inherent part of the original litigation,¹ the jurisdiction of the Court required to be separately founded for the purpose. There was, however, equally, no overt agreement between the parties to refer the matter to the Court, and proceedings were begun by means of a unilateral application on the part of the party responsible for carrying out the basic *Asylum* case decision. It would appear that the other party then simply 'accepted service', so to speak, appointed an agent and complied with all the orders of the Court as to the filing of pleadings, etc. In its ensuing Judgment, the Court, without any specific mention of *forum prorogatum*, made the following statement as to the basis of its jurisdiction in the case (*I.C.J.*, 1951, 78):

'These are the circumstances giving rise to the present case which has been brought before the Court by the Government of Colombia by Application of December 13th, 1950.

'The Parties have in the present case consented to the jurisdiction of the Court. All the questions submitted to it have been argued by them on the merits, and no objection has been made to a decision on the merits. This conduct of the parties is sufficient to confer jurisdiction on the Court.'

Although the language used in this passage is consistent with the case being one of ordinary consent given *ad hoc*, the circumstances, and the absence of any evidence of prior agreement or understanding between the parties to accept a reference to the Court (though there may well have been one), makes it permissible to treat the case as one of prorogated jurisdiction. The passage is also of interest as endorsing the general proposition that conduct, as well as written acceptance, is sufficient to found jurisdiction on a basis of consent.

(iii) *The implication of consent must be clear in order to found jurisdiction by forum prorogatum.* In two other cases—in one specifically, in the other with less clear relevance to the case of *forum prorogatum*—the Court made it clear that an apparent invocation of its jurisdiction, or recognition of it when invoked, was insufficient to found jurisdiction if effected in circumstances which did not permit a clear inference of consent to be drawn. In its Counter-Memorial in the first phase of the *Ambatielos* case, the United Kingdom Government had stated that should the Court find that it had jurisdiction to decide on the obligation of the United Kingdom to submit the Greek claim to a Commission of Arbitration, and that the Greek Government was not precluded by lapse of time from making the claim, then the United Kingdom Government would accede to a proposal made

¹ In the *Corfu Channel* case, the Court, in rejecting the Albanian Government's contention that it had no jurisdiction to determine the compensation payable by Albania, did so partly on the basis that jurisdiction to determine the character or amount of any reparation due is an inherent part of jurisdiction on the *merits*, and needs no further or additional consent from the parties.

earlier by the Greek Government that the Court should substitute itself for the Commission of Arbitration to determine the merits of the claim.¹ But during the subsequent oral hearing, Counsel for the United Kingdom, though repeating this statement, did so in somewhat different terms as to the conclusions the Court would have to come to before the consent thus given would be operative. In its Judgment, the Court dealt with the matter as follows (*I.C.J.*, 1952, 38-39):

'The Hellenic Government's final submissions refer to an offer of the United Kingdom Government (through its Counsel), upon certain conditions, that the Court itself should undertake the function of arbitration. It is true that the United Kingdom Government has made some such offer, but the conditions attached to it are not very clear.'

Then, after stating the conditions attached in the United Kingdom Counter-Memorial, and those mentioned by Counsel, the Court, referring to the latter, went on:

'These conditions seem to go beyond those in the Counter-Memorial. . . . This discrepancy throws some doubt on the existence of any unequivocal agreement between the parties on this matter. The Court has however no doubt that in the absence of clear agreement between the parties in this respect, the Court has no jurisdiction to go into all the merits of the present case as a commission of arbitration could do.'

The mention in this passage of an 'unequivocal agreement between the parties' raises some doubt whether the Court was dealing with the matter as one of *forum prorogatum*. However, what was really in issue was whether the United Kingdom Government had given a clear and unequivocal *response* to the Greek invocation of the jurisdiction of the Court to deal with the merits in place of a Commission of Arbitration. On that basis, it was a question of *forum prorogatum*.² The matter was also considered by the Court in the *Anglo-Iranian Oil* case. Although the issue before the Court was a purely jurisdictional one, relating to the Iranian objection that the dispute did not fall within the class of case covered by Iran's Optional Clause declaration, the Iranian pleadings and submissions did not confine themselves to the jurisdictional issue, but advanced several other objections to the United Kingdom claim which, though preliminary in character, did not relate to the jurisdiction of the Court, but to the admissibility of the claim (e.g. domestic jurisdiction, non-exhaustion of local remedies). These

¹ See above, section (II) (3) *passim*.

² This also seems to be Rosenne's view—see *op. cit.* in n. 2, p. 8, above, at p. 356. The original proposal that, assuming the Court found that there was a case to go to a Commission of Arbitration, the Court should be the Commission and determine the merits of the claim, came from the Greek Government. But, as the Court found that, under the existing treaties and agreements between the parties, it had no jurisdiction to determine the merits of the case, this would have needed a fresh consent of the parties. This the Greek Government had given, by making the proposal that the Court should act as the Commission. The question therefore was had the United Kingdom Government responded with a clear acceptance?

objections could, however, only be heard and determined if the Court in fact had jurisdiction in relation to the case as such. The Iranian Conclusions nevertheless formally requested the Court to find that the claim was inadmissible on these grounds, as well as to find that the Court itself lacked jurisdiction. It was accordingly contended by the United Kingdom, though the contention was not pressed, that this involved an invocation of and submission to the jurisdiction of the Court; or a recognition that it had jurisdiction in the case, thus constituting in effect the necessary response to the original United Kingdom action in seising the Court, and therefore sufficient to found jurisdiction *forum prorogatum*. The Court, after reciting the United Kingdom contention that the Iranian Government had 'by this action conferred jurisdiction upon the Court on the basis of the principle of *forum prorogatum*', and stating that, although Counsel for the United Kingdom had subsequently said he did not wish to press the point, it had not been formally withdrawn, so that the Court must deal with it, proceeded to reject the contention as follows (*I.C.J.*, 1952, 114):

'The principle of *forum prorogatum*, if it could be applied to the present case, would have to be based on some conduct or statement of the Government of Iran which involves an element of consent regarding the jurisdiction of the Court. But that Government has consistently denied the jurisdiction of the Court. Having filed a Preliminary Objection for the purpose of disputing the jurisdiction, it has throughout the proceedings maintained that Objection. It is true that it has submitted other Objections which have no direct bearing on the question of jurisdiction. But they are clearly designed as measures of defence which it would be necessary to examine only if Iran's Objection to the jurisdiction were rejected. No element of consent can be deduced from such conduct on the part of the Government of Iran. Consequently, the Submission of the United Kingdom on this point cannot be accepted.'

Since both in this case and in the *Ambatielos* case above considered, there were at least grounds upon which a different conclusion on the issue of *forum prorogatum* might have been reached, it seems clear that this basis of jurisdiction is one which the Court will only accept where the inference of consent, or of recognition of, or submission to, the jurisdiction, is quite clear, as it was, for instance, in the *Haya de la Torre* case and in the *Corfu Channel* case.¹ In particular, the Court in the *Ambatielos* and *Anglo-Iranian Oil* cases, showed an evident unwillingness to take advantage of technical errors of pleading, or of possibly unguarded or premature statements made on behalf of a party.

(iv) *Evaluation of the principle of forum prorogatum*. Rosenne, in an important passage² in which he draws attention to the grave dangers to the standing and prestige of the Court which must arise if consent to its jurisdiction is imputed to States in circumstances in which they have not really

¹ See subsection (ii) above, and subsection (iv) below respectively.

² *Op. cit.* in n. 2, p. 8, above, § 128, pp. 301-2.

given it, or where there is room for serious doubt as to whether they have done so,¹ appears to connect this matter with the attitude taken up by the Court on the question of *forum prorogatum*. The present writer, while fully sharing the learned author's preoccupations on the subject of 'reality of consent'—as to this, see subsection (3) below—has some doubt about this particular connexion. The present Court has only dealt with the subject of *forum prorogatum*, as such, in four cases; and in two of these, as has been seen, it declined any exercise of jurisdiction on that basis, while in the other two (the *Haya de la Torre* and *Corfu* cases) the consents or submissions involved were so clear that no tribunal could have arrived at any other conclusion but that jurisdiction had been duly conferred upon it. It is true that in the *Corfu* case the Albanian Government persisted in protesting that it was not a consenting party to the exercise of jurisdiction in the case. But how was it possible to accept that, when this same Government had not only formally notified the Court in writing of its 'acceptance of the Court's jurisdiction'² but had also appointed an agent in the case, and taken other steps in the proceedings? In actual fact the Court seems to have adopted an attitude of considerable caution and conservatism on the subject of prorogated jurisdiction,³ and it is hardly on this ground that its decisions on the subject of consent can be criticized. As far as the basis of jurisdiction involved by the principle of *forum prorogatum* itself is concerned, it would seem that, applied with care, and in a conservative manner, as the Court has done, it is capable of adding a useful element of flexibility to the jurisdiction

¹ Rosenne suggests (op. cit., p. 302) that all or most of the cases in which a judgment or advisory opinion of the Court has not been complied with, are cases in which the consent of the States concerned to the Court exercising jurisdiction or giving an advisory opinion, was only nominal, or did not in real substance exist. There is here a very pertinent point which is discussed below in subsection (3). However, the learned author connects the matter with the exercise of the jurisdiction *forum prorogatum*. But this is clearly only applicable to litigations not advisory opinions; and, of the three litigations specifically mentioned, one, namely, the indication of interim measures in the *Anglo-Iranian Oil* case was not strictly a case of *forum prorogatum* at all—(the Iranian Government sent a message disputing the Court's jurisdiction, and, at that stage, appointed no agent and did not appear); while in the case of the other two, the *Haya de la Torre* and *Corfu Channel* cases, the respondent party had unquestionably submitted to the jurisdiction. The case which in fact must obviously give rise to the most serious doubts on the score of reality of consent is the *Ambatielos* case. But this was not a case of *forum prorogatum*—indeed, the Court in that case expressly rejected that basis of jurisdiction—see subsection (iii) above. And the Court's decision in the case was duly carried out.

² The Albanian Government considered that the case should have been referred to the Court by a special agreement between the parties and not by a unilateral application on the part of the United Kingdom. However, in a communication dated 2 July 1947 to the Registrar of the Court, while making this point, the Albanian Government stated specifically that it was 'prepared notwithstanding this irregularity . . . to appear before the Court'. Then, after again making 'the most explicit reservations as to the manner in which the Government of the United Kingdom has brought the case before the Court . . .', the letter continued 'The Albanian Government wishes to emphasize that *its acceptance of the Court's jurisdiction* for this case cannot constitute a precedent for the future' (italics added). If this is not 'consent' (at any rate in the legal sense), or submission to the jurisdiction, what is?

³ This is also Sir Hersch Lauterpacht's view, see op. cit. in n. 4, p. 10, above, at pp. 103-7 in the section on 'Judicial Caution', and p. 202.

of the Court, and of reinforcing this by providing a process through which disputes can be got before the Court in the type of case where one of the parties may be unable or unwilling to *agree* to have recourse to the Court, but may not be unwilling to respond if the dispute is taken there. The process also has other uses which will be noticed in the next cycle of these articles.¹ What it should evidently not be employed for, is as a trap in which to catch the insufficiently circumspect or prescient, by imputing to them consents the reality of which is open to doubt. The question of jurisdiction based on this type of consent must now be considered.

(3) *Consent and the question of reality*

(a) *What is entailed by the notion of consent.* Before the subject of reality of consent can usefully be discussed in connexion with the founding of jurisdiction, it is necessary to consider what is meant by consent, and what by the reality of it for present purposes. Clearly by consent, in the legal sense of the term, is not meant *willingness*, which may or may not exist in the given case. A man may agree to undergo an operation but it does not follow that he actually undergoes it willingly: probably he seldom does, and it might equally not be far from the truth to say that States seldom have recourse to arbitration or judicial settlement with any very great enthusiasm. This inference can be drawn with reasonable certainty from the frequency with which jurisdictional points are taken whenever it is possible to do so.² Jurisdictional objections are sometimes frowned upon as being an attempt by the State concerned to escape from its legal obligations and from honouring the consents it has given,³ but that, of course, begs the very question which the jurisdictional objection raises, and which has to be decided, namely, whether consent *was* given. Such a feeling may be natural, but it cannot justify imputing to a State a consent that does not exist. Equally, if a true consent has been given, the State ought not to be allowed to escape its consequences on a technicality, or because of unwillingness when it comes to the point. The problem arises comparatively seldom in the case of consents given or submissions made *ad hoc*,⁴ but is very liable to arise where consent has been given generally and in advance, either under a treaty or, still more, under an Optional Clause declaration. It is, however, rare for a consent of this kind, if ostensibly given, to be open to invalidation on the sort of ground that may in certain circumstances

¹ In connexion with the various *Aerial Incident* and *Antarctica* cases.

² See on this subject section (I) (2) above.

³ For an excellent discussion of this matter, see Rosenne, *op. cit.*, in n. 2, p. 8, above, at pp. 345-7.

⁴ But it may well do so where the intention to submit has to be implied from some statement or course of conduct, particularly where the jurisdiction is said thereby to have been invoked or recognized.

cause the invalidation of a treaty.¹ States are seldom led by fraud, error or force exercised against the persons of their representatives to give such consents as these: the conclusion of a treaty, or the making of a unilateral declaration accepting an obligation to have recourse to arbitration or judicial settlement—these are deliberate operations, and the consent given is unlikely to be unreal or vitiated on those grounds. The heart of the question almost always is, not whether *a* consent has been given, but *what* it is that has been consented to—or, more particularly, what and how much is covered by the consent given. This is why, in so many cases, jurisdictional questions resolve themselves into questions of the interpretation of some treaty or other international instrument.

It is rare indeed for a State, whether by treaty or by unilateral declaration, to assume an unlimited jurisdictional obligation. Usually there are conditions and restrictions which are either inherent (e.g. in the subject-matter of the treaty containing the relevant provision for the settlement of disputes), or else deliberately attached to the consent by the State itself. If, by a process of interpretation, the scope of the obligation is widened beyond its inherent and natural limits, or those imposed by the State itself, so as to embrace matters extraneous to what was covered by the consent given, it is clear that the State will find itself saddled with an obligation to submit disputes to arbitration or judicial settlement which it had never intended to assume. Thus the matter resolves, or may appear to resolve itself into the familiar question of the liberal or restrictive interpretation of arbitral clauses. Yet it should be evident that neither a deliberately liberal nor a deliberately restrictive interpretation of such clauses can be justified. The first is unfair to one party (usually the defendant State) by imputing to it a consent which it may not really have intended to give, or realized it was giving: the second is unfair to the other party (usually the plaintiff State) by depriving it of a means of recourse the benefit of which it was entitled to expect under the clause in question. But while neither is justified, it is safe to say that the first, though it may appear superficially to promote the ideal of an enlargement of international arbitral and judicial jurisdiction,² involves by far the greater long-term dangers for the standing and

¹ See as to this the present writer's 'Third Report on the Law of Treaties (Essential Validity)' published in the *Yearbook of the International Law Commission of the United Nations for 1958*.

² Which, of course, everyone, including the present writer, desires. The dilemma involved is well put in the following passage from Rosenne (op. cit., p. 302):

'There is probably not a judge nor a jurist who does not want to see the borders of legal competence extended at least to include all matters which, objectively speaking, are legitimately the subject of judicial settlement, and from the abstract standpoint the activities of the Court must be regarded as satisfactory by those who desire to see a genuine and broad system of jurisdiction established. Nevertheless there are grounds for anxiety lest the Court has advanced too far beyond what the conscience of those responsible for the affairs of their States is yet prepared to admit, especially having regard to the unsatisfactory state of the law governing the enforcement and execution of judicial decisions.'

prestige of this jurisdiction—since nothing undermines confidence in the process of international adjudication so quickly and completely as the feeling that international tribunals may assume jurisdiction in cases not really covered by the intended scope of the consents given by the parties. It is sometimes urged that because international jurisdiction is limited by the necessity for consent, and this limitation is a severe one, there is every justification for giving the maximum scope to any given consent that it can be made to bear—a sort of principle of *caveant proferentes*. States, it may be said, enjoy the benefit of the fact that their subjection to international jurisdiction is limited by their own consent: therefore the onus is on them to make sure that their consents do not cover more than they are intended to cover and are so framed that their limits are unmistakable. This is a plausible argument, but nevertheless questionable, because it overlooks the fact that States would not be subject to any international jurisdiction at all but for their own consent. It is not therefore a question of their enjoying the benefits of the limitations imposed by this consent, for without the initial consent there would be no need for limitations, since there would be no international jurisdiction. Just because consent is the basis, and the sole basis of it, the jurisdiction simply does not exist outside the scope of the consent given. Consequently, jurisdiction ought at the very least not to be assumed in cases in which there is room for any serious doubt as to whether consent was given, and whether it covers the dispute. This is putting it less high than it can be put: strictly, jurisdiction ought only to be assumed if it is quite clear that the parties have agreed to its exercise in relation to the dispute before the tribunal—that is to say that they have expressed themselves in such terms, or performed such acts, or have otherwise so conducted themselves, that (whatever they may subsequently have professed or may now contend) the view that they did *not* consent cannot, in law, be reconciled with the term used, or the acts performed, or the behaviour manifested. It is only too easy in this matter for international tribunals to pay lip-service to the principle of consent and to profess only to assume jurisdiction by the consent, express or implied, of the parties, while adopting an interpretation of what is involved by consent, and more particularly of what matters are covered by a particular consent, such that, in practice, a jurisdiction is assumed going well beyond what was intended to be conferred—or which was not intended to be conferred at all. To sum up—what is required, if injustice is not to be done to the one party or the other, is neither restricted nor liberal interpretations of jurisdictional clauses, but *strict proof* of consent.

(b) *Consent by inference*. Apart from those cases where there is genuine ambiguity of terminology, or where some inherent indeterminacy is involved (e.g. by reason of difficulties of classification in relation to the

subject-matter of the dispute), doubts about the reality of consent arise chiefly in those cases where consent is not direct but has to be inferred. No one of course denies that, in relation to jurisdiction as with everything else, consent may be implied as well as expressed—indeed, some of the clearest cases of consent in this field are cases of implied consent, e.g. inferences drawn from conduct (and such an inference may sometimes even be held to prevail over an express statement in the opposite sense). It is not therefore the fact that consent is inferred which gives rise to doubt, but the processes by which in some cases it is alone possible to arrive at the inference, and the ensuing query whether, if the inference can only be drawn in that way, it ought to be drawn at all. Implication, as compared with expression, is necessarily indirect. But, subject to that, implication may itself be direct or indirect. It is one thing to draw an inference directly and immediately from a certain action or statement; but it is less satisfactory, and far more questionable, when the case is of the type where the final inference is based on a previous inference which, it may be, is itself based upon something else—a process of, so to speak, chain inference or reasoning. Where for instance consent, if it exists at all, depends on the terms of document A, but in order to determine the meaning and application of document A, it is necessary to have recourse to document B to which it refers, or which is alleged to form an integral whole with it, and when in order to arrive at the meaning of document B, it is necessary in the same way to have recourse to document C—which, it may be, is dated several centuries earlier,¹ then the inference of real consent may begin to look dubious. It is not that the process is illegitimate in itself, but that its use for this particular purpose must raise the question whether, if the matter is looked at as a whole, the result amounts to the real substance of consent. The principle of remoteness is as much applicable here as in other legal spheres, such as that of damages. It is a question of the point beyond which inference cannot be used without leading to unreality. If inference is piled on inference, and reference on reference, then the connexion between the point of departure and the point of emergence, though it may technically exist, may be inadequate to support the inference of true consent. Particularly is this the case where a consent given, primarily and ostensibly in relation to a given class of case, is held by such a process of reference to be applicable to other classes of disputes which were certainly not in the immediate contemplation of the State concerned when it gave its arbitral undertaking. As has been said, it is not that the process is illegitimate in itself, but the desirability of applying it to jurisdictional issues is questionable. The type of consent necessary to found international jurisdiction is, or should be, a positive one. It may arise by inference, but must, as so inferred, be seen to be something positive and

¹ This actually occurred in the *Ambatielos* case—see subparagraph (c) (i) below.

definite, not open to reasonable doubt or question. Can this ever be the case when the kind of process described above has had to be employed in order to create any grounds at all on which the existence of the necessary consent can be presumed?

(c) *The Court and reality of consent.* This matter has been so comprehensively considered by Sir Hersch Lauterpacht in his latest work¹ that it would be otiose to cover the ground again here. The eminent author draws attention to the cogency of the arguments that can be used in support of both the two views discussed in the latter part of paragraph (a) above, namely, first, that governments being the masters of what they say, and of the commitments they enter into, must, as Sir Hersch says, 'take the risk of any uncertainty resulting from their failure to circumscribe explicitly the . . . commitment thus undertaken';² and, on the other hand, the view on which he considers the Court has acted, namely, that 'jurisdiction being grounded in the will of the parties, it must be strictly proved'.³ He then continues: 'The conflict between these two sets of considerations is real and cannot be solved or attenuated by any legal formula. The solution must depend on the strength of these considerations as determined by the circumstances of each case.'⁴

(i) *Attitude of the Court itself.* In the circumstances just described, it would be as futile as it would be unfair to expect complete consistency from any tribunal. As regards the Permanent Court, in the few cases in which that Court made abstract statements of principle on the subject, going beyond simply enunciating the principle of consent, and determining whether, in the given case, it had jurisdiction or not, it appears to have pronounced in favour of a strict⁵ interpretation of jurisdictional clauses;⁶ nor do there seem to have been any cases in which that Court assumed jurisdiction on the basis of a doubtful consent. As regards the present Court, during the period covered by this and the previous series of articles, there were four prominent cases in which serious jurisdictional issues were raised in contentious cases,⁷ involving denials either of the Court's juris-

¹ Op. cit. in n. 4, p. 10, above, at pp. 91-100, 200-6 and 338-47. The eminent author while rejecting the idea of any designedly restrictive interpretation of jurisdictional clauses, and evidently leaning in the direction of such interpretation as will give these clauses their maximum legitimate effect, emphasizes that what is required, and what has to be proved, is that the parties did intend to assume an undertaking for arbitral or judicial recourse.

² Ibid., pp. 98-99.

³ Ibid., p. 99.

⁴ Ibid.

⁵ 'Strict' is not the same thing as 'restrictive'.

⁶ For instance in the *Phosphates in Morocco* case (Series A/B, No. 74, at p. 23) the Court referred to 'resort to a restrictive interpretation that, in case of doubt might be advisable in regard to a clause which must on no account be interpreted in such a way as to exceed the intention of the State that subscribed to it'; and in the *Free Zones* case (Series A/B, No. 46, p. 139) the Court said that it did not 'dispute the rule . . . that . . . every clause conferring jurisdiction upon the Court, must be interpreted strictly'.

⁷ In the case of the Court's advisory jurisdiction, the question of consent, while certainly capable of arising (see § 3 below, on the advisory jurisdiction), does so in a different form.

diction or that of another tribunal, namely, the *Corfu Channel* (Jurisdiction and Compensation phases), the *Anglo-Iranian Oil* (both phases), *Ambatielos* (both phases) and *Nottebohm* (Jurisdiction) cases. Owing to the existence of more than one phase in two of these cases, there were thus seven major decisions on jurisdiction. Of these, six were in favour of jurisdiction and only one (the second *Anglo-Iranian Oil* decision) against. These figures, however, call for some analysis. The two jurisdictional decisions in the *Corfu Channel* case were based on the same fundamental considerations and facts, and the existence of consent was so clear as to admit not merely of no reasonable doubt, but of no possibility of it.¹ The same applies to the jurisdictional decision in the *Nottebohm* case.² In the first phase of the *Anglo-Iranian Oil* case (Interim Measures), the Court did not apply, and evidently did not consider it was called upon to apply any principle of consent, and it treated the jurisdiction to grant interim measures as a special case falling outside the consent rule, and governed by other considerations.³ As Iran had clearly *not* consented to interim measures, the question of the reality of an ostensible consent did not arise. This leaves the decisions in the second (main) phase of the *Anglo-Iranian Oil* case, and in the two phases of the *Ambatielos* case as being the only ones by reference to which the attitude of the Court in borderline cases, where the reality of the consent said to have been given is in question, can really be tested. However, despite the fact that there was a marked similarity between certain aspects of the jurisdictional issues in these two cases,⁴ and also that both involved striking examples of the kind of argument by chain inference, and double or treble reference, discussed in subsection (b) above, a comparison between the decisions does not really help much towards elucidating the general attitude of the Court on this matter, for the Court came to completely different conclusions in the two cases. To show exactly how this came about would require a detailed study of both cases, which cannot be entered into here.⁵ Briefly, despite the similarity of a number of the jurisdictional aspects, and of much of the argument involved, the Court refused

¹ See subsection (2) (d) (iv) above.

² See section (I) (4) above.

³ As to this see § 2 (II) below.

⁴ In both cases the claimant State was asserting a claim which was essentially a general international law claim, not a treaty claim. But in both cases the defendant State was only amenable to the jurisdiction of the Court (or other relevant tribunal) if an applicable *treaty* could be pleaded, and therefore in both cases the claimant State, in order to found jurisdiction, had to invoke the provisions of some treaty said to be applicable. In neither case was there a treaty which *directly* covered the claim; but in both cases there were (a) treaties between the parties granting certain most-favoured-nation rights, (b) other treaties alleged to confer a direct right to treatment in accordance with the general rules of international law, and said to be applicable by reason of the most-favoured-nation clauses of the first treaties. A full discussion of the most-favoured-nation point will be found in the present writer's article in this series in this *Year Book*, 32 (1955-6), pp. 84-96.

⁵ But see generally, earlier in the present section (III), and in section (II) above; also in the articles in this series in this *Year Book*, 32 (1955-6), pp. 81-96, and 33 (1957), pp. 253-70.

to assume jurisdiction in the one case (the *Anglo-Iranian*), but, in the other, found both in favour of its own jurisdiction (to determine a question affecting the jurisdiction of another tribunal) and also in favour of the jurisdiction of that other tribunal itself, or at any rate of the obligation of the parties to have recourse to it.¹

In the *Anglo-Iranian* case, the Court, as has been seen earlier,² showed a firm resolve not to go one step beyond the limits of what Iran could fairly be held to have intended to cover by its optional clause declaration, and in order to do this was willing *inter alia* to depart from normal canons of treaty interpretation, in so far as their application might have led to a result considered by the Court, on the basis of extraneous evidence, to be at variance with Iran's probable intentions.³ In this case, therefore, the line taken by the Court afforded a striking example of that 'judicial restraint' and caution to which Sir Hersch Lauterpacht devotes an important section of his recently re-edited work, as demonstrating one of the characteristic features of the policy of the Court.⁴ But the line taken in the *Ambatielos* case, whatever its abstract merits,⁵ certainly cannot be regarded as exhibiting this feature, if due regard is paid to the *outcome* of the case, even though the statements of principle made by the Court were unexceptionable, and clearly endorsed the necessity for a real and positive character in the consents relied upon as founding jurisdiction. Thus, to draw attention again to a passage quoted earlier in another connexion,⁶ the Court said (*I.C.J.*, 1952, 38) that on a certain jurisdictional issue there was

'... some doubt on the existence of any unequivocal agreement between the Parties. ... The Court has however no doubt that, in the absence of a clear agreement between the Parties ... the Court has no jurisdiction to go into ... the merits of the present case as a commission of arbitration would do.'

¹ See generally, section (II) (3) above.

² Subsection (2) (b) (ii) (c) of the present section (III).

³ Judge Read, who evidently considered this interpretation to be definitely restrictive, protested strongly against it in his dissenting opinion, and in particular against the idea of applying any special criteria to the interpretation of a jurisdictional undertaking by means of an optional clause declaration, other or different from those applied in the case of jurisdictional clauses in treaties (see subsection (2) (b) (ii) (c) above). All jurisdictional clauses should in his view be interpreted on the basis of the same principles (*I.C.J.*, 1952, 142-4). In effect Judge Read, who, as he said, was a strong upholder of the principle of interpretation according to the 'natural and ordinary meaning' of the terms employed, was contending that the Court had rejected this principle in order to place a deliberately restrictive meaning on the relevant passage. In the light of this, and since a number of eminent jurists are inclined *both* to look somewhat beyond the natural and ordinary meaning by resorting in some measure to extraneous means of interpretation, *and* also to advocate what might be called a 'maximum effect' interpretation of jurisdictional clauses, it may be pertinent to point out that if, in the *Anglo-Iranian Oil* case, the Court had confined itself to predominantly textual methods of interpretation, without recourse to extraneous factors, it would have been on very strong ground in finding in the opposite sense from what it did—i.e. in finding that it had jurisdiction—(see n. 2, p. 78, above).

⁴ Op. cit. in n. 4, p. 10, above, 'Part Two: Judicial Caution'.

⁵ The crucial point of treaty law arising in the first phase of the case was discussed in an earlier article in this series—see this *Year Book*, 33 (1957), pp. 255-70.

⁶ See subsection (2) (d) (iii) above.

But the Court found that the case must go to the Commission of Arbitration, and also, by so finding, gave in effect an affirmative answer to its own question (*I.C.J.*, 1953, 19): '... the question is whether the consent given by the Parties, in signing the Declaration of 1926 to arbitrate a certain category of disputers,¹ does or does not extend to the *Ambatielos* claim.' Consequently, the end result was that the defendant party found itself obliged to arbitrate a claim on the basis of a seventy-year old treaty (which had itself only been brought into the matter by a process of reference),² and of an argument which referred from that treaty to a series of other treaties, including in particular several which were three hundred years old—a claim which could only by an unusual interpretation of the normal terms of a commercial treaty be regarded as having any connexion with the treaty³—a claim, moreover, of a type which that party could certainly not have supposed at the time of the conclusion of the treaty to be covered by the treaty's arbitration clause, and which, if it had so supposed, it would certainly have taken steps expressly to exclude, as being unsuitable for arbitration as a claim arising out of commercial treaty obligations. The United Kingdom had naturally only intended under this treaty to submit to arbitration claims having an intrinsically commercial treaty character, the validity or otherwise of which depended directly on the treaty terms. It could not have supposed itself to be entering into the vastly wider obligation to arbitrate an indefinite and unspecified range of claims the validity of

¹ But, as has been seen, the Court never decided whether the *Ambatielos* claim came within the 'certain category of disputes' specified in the Declaration (though the dissenting Judges dealt with that matter (see subsection (ii) below). Thus the Court, having said that 'the question is ... etc.', did not answer that question, yet found that the case must go to the Commission.

² It should be explained that, in order to make the confusions of this case even worse confounded, the basic agreement to arbitrate arose under the old Anglo-Greek Treaty of Commerce and Navigation of 1886. The more recent Declaration of 1926 was only entered into in order to keep alive the obligation to arbitrate surviving claims under the 1886 Treaty, even after that Treaty had lapsed.

³ The various steps involved by the whole Greek argument were as follows: (i) Declaration A was said to rank as a provision of Treaty B. (ii) The Court had jurisdiction to interpret Treaty B and therefore to interpret Declaration A. (iii) Declaration A involved an obligation to arbitrate claims based on Treaty C. (iv) Treaty C contained an ordinary most-favoured-nation clause covering 'all matters relating to commerce and navigation'. (v) *Via* this clause, Greece claimed the benefit of a number of other treaties, D, D₁, D₂, D₃, etc. (vi) These treaties were said to confer a right to treatment in accordance with (E) the general rules of international law. (vii) Therefore the United Kingdom was bound under the provisions of an ordinary commercial treaty to arbitrate a claim raising and depending essentially on general international law, not commercial treaty issues. (viii) The Court, having jurisdiction to do so under (i) and (ii) above, could and should pronounce the United Kingdom to be so obliged.

That in these circumstances the Court found a way of acting in accordance with (viii) while avoiding expressing any opinion on points (iv)–(vii), beyond declaring them to exist, made no difference either to the character of the Greek argument, or to the practical result of the proceedings before the Court. Commenting even only on that part of this claim which involved holding the 1926 Declaration (A) to be part of the 1926 Treaty (B), Judge Basdevant said (*I.C.J.*, 1952, 72): 'It is impossible to attribute to the framers of the Declaration an intention they never expressed, namely to create a system of such complexity, and one which, at the present time, neither of the parties would wish to see applied.'

which would or might depend essentially on general rules of international law quite outside the treaty in question.¹ The Court, it is true,² avoided this issue by giving a decision in the second phase of the case which could be regarded as leaving the fundamental jurisdictional issue of the treaty basis of the claim open for determination by the eventual arbitral Commission, and in this (for reasons already considered) it may have been justified. But in order to achieve this, it had to decline to interpret, or refrain from interpreting, the very instrument which, in the first phase of the case, it had assumed jurisdiction to interpret, and it had to content itself with registering the evident fact that the parties were in dispute as to that interpretation. This situation arose because of what Professor Verzijl has characterized as the 'unfortunate', 'regrettable' and 'questionable'³ decision involved by the Court's finding in the first phase of the case. This turned on the view that a certain joint Declaration of the parties was a 'provision' of a treaty concluded on the same day. That view may have been a possible one, but it involved a difficult, and far from obviously convincing argument, as can be seen from the emphatic terms of the opinions of the Judges who dissented from it.⁴ In short, it would seem that in the *Ambatielos* case the Court was prepared to be satisfied with far less than, in the Anglo-Iranian case, it had considered necessary in order to regard the defendant State as a consenting party to its jurisdiction, and that it adopted a much less 'restrictive' attitude on the jurisdictional issue. Judge Read in the *Anglo-Iranian* case drew pointed attention to this contrast when he said (*I.C.J.*, 1952, 143):

'In the *Ambatielos* Case . . . this Court upheld its jurisdiction, notwithstanding that a restrictive construction of the jurisdictional clause would have led, inevitably, to an opposite result.'

Without attempting to reach any final conclusion on the respective merits of these two decisions, therefore, it can be said (see pp. 91-92, above) that they hardly afford an adequate guide to the Court's attitude in those cases where the reality of the consent said to have been given is open to ques-

¹ Although the *Ambatielos* claim arose out of a commercial transaction, the actual and basic legal issues involved in the case were not commercial, for the complaint itself related to the litigation that followed upon the commercial transaction, that is to say to the conduct of the English courts and of government officials in relation to the litigation. This basis of complaint was essentially a 'denial of justice' one, as the four dissenting Judges in the second phase of the case found—see subsection (ii) immediately below. The conclusion that has to be drawn on the basis of what happened in the *Ambatielos* case, is that countries whose normal commercial treaties include an arbitration clause or provide for a reference to the International Court, must consider very carefully what the scope of their obligation under these clauses may now turn out to be—especially if the treaty contains the customary provisions for most-favoured-nation treatment.

² See section (II) (3), above *passim*.

³ *Loc. cit.* in n. 4, p. 23, above, at pp. 68-69 and 72; and see passages quoted above in n. 3, p. 32.

⁴ McNair, Basdevant, Zoričić, Klaestad and Hsu Mo. This matter, which is basically one of treaty law, was discussed in this *Year Book*, 33 (1957), pp. 255-70.

tion.¹ By the particular *ratio decidendi* adopted in the *Ambatielos* case, the Court avoided pronouncing on the legitimacy of the inferential chain process by which the claim was said to be based on the Treaty containing the relevant arbitration clause. But the *result* was that the defendant party found itself obliged² to arbitrate the claim on that basis. The four jointly dissenting Judges in that phase of the case clearly considered that basis to be insufficient, and their views must now be considered.

(ii) *Views of the jointly dissenting Judges in the second phase of the Ambatielos case.* The views of the four jointly dissenting Judges³ on other aspects of the general question of consent as the basis of international jurisdiction have already been considered.⁴ After referring to the general principle of the necessity of consent, and citing various decisions and passages from judgments of the Permanent Court, the jointly dissenting Judges continued (*I.C.J.*, 1953, 29):

'Before declaring a State to be bound to submit a dispute to the decision of an international tribunal, the Permanent Court and the present Court have always considered it necessary to establish *positively*, and not merely on *prima facie* or provisional grounds, that the State in question had in some form given its consent to this procedure. No distinction in this connection has been drawn between cases where the jurisdiction of the Court was involved and cases where that of some other tribunal or authority was in question.'

Applying this to the facts of the dispute, the four Judges said (*ibid.*):

'Since there is nothing in the Declaration of 1926 to indicate an intention that *prima facie* considerations should be regarded as sufficient, it is our opinion, based on the principle referred to above and the way in which this principle has been invariably applied, that the United Kingdom can only be held to be under an obligation to accept the arbitral procedure by application of the Declaration of 1926 if it can be established to the satisfaction of the Court that the difference as to the validity of the *Ambatielos* claim falls within the *category* of differences in respect of which the United Kingdom consented to arbitration in the Declaration of 1926.'

Next, after referring to the principle of interpretation according to the 'natural and ordinary meaning' of the terms used, the jointly dissenting Judges (*ibid.*, 30) said that, in their opinion, the natural and ordinary meaning of the words 'based on the provisions of the Treaty of 1886 . . . excludes claims whose support must be found elsewhere'. Then, in a passage which

¹ Given the similarity of the issues involved (see n. 4, p. 91, above) some firm conclusions might have been drawn if the Court had decided both cases in favour of the plaintiff State, or both in favour of the defendant. But it decided the *Anglo-Iranian* case in favour of the defendant State, and then, the plaintiff State in that case having become the defendant in the *Ambatielos* case, it decided the latter in favour of the plaintiff State.

² In practice, that is. In theory it might have been possible to raise the basic jurisdictional issue before the Commission of Arbitration itself. The reasons why this was felt to be impracticable and was not done have been explained in n. 1, p. 51, above.

³ McNair, Basdevant, Klaestad and Read.

⁴ In subsection (1) of the present section (III) and in subsection (4) of section (II) above.

has already been quoted *in extenso*,¹ they said that the arbitral clause of the treaty concerned 'cannot be extended to cover claims in respect of which those provisions [i.e. of the treaty] might be invoked without really being applicable'. Consequently the dispute would only be arbitrable under that clause 'if the examination of the claim demonstrates that it falls within the framework of the Treaty'. In support of this they quoted (*ibid.*, 31 and 33-34) the two following passages from decisions of the Permanent Court:

'For this reason the Court, bearing in mind the fact that its jurisdiction is limited, that it is invariably based on the consent of the respondent and only exists in so far as this consent has been given, cannot content itself with the provisional conclusion² that the dispute falls or not within the terms of the Mandate. The Court, before giving judgment on the merits of the case, will satisfy itself that the suit before it, in the form in which it has been submitted and on the basis of the facts hitherto established, falls to be decided by application of the clauses of the Mandate. For the Mandatory has only accepted the Court's jurisdiction for such disputes.'³

'... it is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance.'⁴

The jointly dissenting Judges, in their consideration (on the above bases) of the question whether the *Ambatielos* case was in fact based on the Anglo-Greek Commercial Treaty of 1886, cited and discussed the four Articles of the Treaty invoked by the Greek Government. One of these (Article XV) dealt with free access to the courts. The jointly dissenting Judges (*ibid.*, 34) dismissed the possibility that any basis for the claim could be found in this Article, since the private claimant in the case had had free access to the courts. His claim arose precisely out of what he alleged to have occurred after he had had such access, and had indeed argued his case before two domestic tribunals. They then went on to deal with the central issue involved, namely, the Greek Government's attempt—since the Greek claim was really based on the general rules of international law about denial of justice—to import those rules into the Treaty through its ordinary most-favoured-nation clause, *via* which, so the Greek Government contended, other treaties could be brought in; and these, it was claimed, made the general rules of international law applicable to the case. The jointly dissenting Judges dealt with this line of reasoning as follows (*ibid.*, 34):

'In fact, when the Hellenic Government complains that the executive or judicial authorities of the United Kingdom have not acted according to the requirements of the

¹ Subsection (4) of section (II) above.

² This, however, was exactly what the majority of the Court did in the second phase of the *Ambatielos* case, for without going into the substance of the jurisdictional objection raised, they merely found that because the parties differed over it, there was a case to go to the arbitral Commission.

³ The *Mavrommatis* case, *P.C.I.J.*, Series A, No. 2.

⁴ The *Phosphates in Morocco* case, *P.C.I.J.*, Series A/B, No. 74.

proper administration of justice, it is alleging a violation of general international law. Can such a claim be considered to be based on a provision of the Treaty of 1886? At this stage we meet Article X of the Treaty of 1886 which has been invoked by the Hellenic Government. This Article contains a most-favoured-nation clause which, in its opinion, embodies certain references to the requirements of the proper administration of justice. But, having regard to its terms, Article X promises most-favoured-nation treatment only in matters of commerce and navigation; it makes no provision concerning the administration of justice; in the whole of the Treaty this matter is the subject of only one provision, of limited scope, namely, Article XV, paragraph 3, concerning free access to the Courts, and that Article contains no reference to most-favoured-nation treatment. The most-favoured-nation clause in Article X cannot be extended to matters other than those in respect of which it has been stipulated. We do not consider it possible to base the obligation on which the Court has been asked to adjudicate, on an extensive interpretation of this clause.'

With regard to the remaining Articles invoked, the jointly dissenting Judges said (*ibid.*):

'The Hellenic Government has also invoked Articles I and XII of the Treaty of 1886 as a basis for its claim, but these Articles, like Article X, are unconnected with the administration of justice. They throw no light on the question whether the evidence was properly or improperly produced in the English Courts. Nor do they permit an opinion to be formed as regards the complaint of improper performance of the contract or of unjust enrichment, even assuming that these complaints fall to be considered by an international tribunal.'

Consequently, the jointly dissenting Judges concluded (*ibid.*, 35):

'A comparison between the object of the claim and the provisions of the Treaty . . . leads . . . to the conclusion that the claim—whether it be justified or not—falls outside the scope of the arbitration clause. . . .'

It should be noted that, as the Court itself declined to go into the substance of the jurisdictional objection raised by the United Kingdom, i.e. the substantive issue of whether the claim was based on the relevant treaty or not, the views of the jointly dissenting Judges to the effect that it was *not*, involved no formal contradiction with the views of the Court. Their views therefore stand as an effective denial of the legitimacy of the process of enlarging the scope of an obligation to arbitrate, by bringing within it disputes belonging to a category which is not basically the category covered by the arbitration clause. The real difference between the Court and the dissenting Judges in this phase of the case related to what was the proper task of the Court in that phase. The dissenting Judges thought it must involve more than merely finding that, because the parties were at variance as to whether the case was covered by the arbitration clause, it must go to the arbitral Commission. They considered¹ that the Court ought not so to decide without first satisfying itself that the claim really did fall within the scope of the arbitral clause, and hence of the obligation to arbitrate.

¹ See section (II) (4) above.

§ 2. PARTICULAR AND INCIDENTAL QUESTIONS OF JURISDICTION IN CONTENTIOUS CASES

(I) THE *NON ULTRA PETITA* RULE

(1) *Place of the rule*

The *non ultra petita* rule, which entails that an international tribunal will not decide more than it is asked to decide, and will not award by way of compensation or other remedy more than it is asked to award, has sometimes been classified as a rule of procedure.¹ But it is strictly a jurisdictional rule; being, at any rate in its main aspect, a derivative of the consent principle. However, there is an obviously procedural element about the second aspect, according to which the tribunal will not, for instance, award a higher sum by way of damages than the claimant party has requested. But even there, the matter is governed by the jurisdictional principle that an international tribunal's powers are limited to what is conferred upon it by the parties. This is equally true of such a tribunal as the International Court, as regards any powers not resulting directly from the Statute or (within the scope permitted by Article 30 of the Statute²) the Rules of Court; and even the powers conferred by the Statute and Rules of Court derive equally from the (antecedent general) consent of the parties. The Court therefore (subject to its Statute and Rules), is confined to acting on, and cannot go beyond, the submissions of the parties themselves. It may be argued that, whatever its actual submissions, a State will always be a consenting party to being given more than it asked for. This is by no means necessarily true, and cannot be assumed.³ Moreover, it has to be remembered that the conduct by the other party of its case will have been affected, at the least, and may even have been determined by the character of the claimant's submissions, and of the remedies (and even, where damages are concerned, by the amount) asked for. But, if the rule is a basically jurisdictional one, it is right to regard it as subordinate or incidental. Its field of application is somewhat limited, and in many cases it would be difficult to regard it as being other than merely a special application of the rule that an international tribunal only has jurisdiction to deal with disputes submitted to it by the parties, and has no jurisdiction in respect of any matter lying outside the scope of the consents they have given.

¹ See the discussion in Rosenne, *op. cit.* in n. 2, p. 8, above, at pp. 271-2.

² Which directs the Court to 'frame rules for carrying out its functions', and in particular to 'lay down rules of procedure'.

³ Elements of policy, expediency, realism, or even of forbearance, can and do enter into such a matter.

(2) *Lack of competence to afford remedies or award damages, other or higher than those requested by the party in whose favour they are given*

No case illustrating this aspect of the rule occurred during the period under review. As an example, the *Corfu* case occurring in the previous period may be recalled. The Court, having appointed experts to assess the damages, nevertheless declined to make awards in accordance with their findings where these exceeded the figure claimed by the United Kingdom Government, on the ground that it could not go beyond that Government's own claims as stated in its final submissions. Apart from the general observations made in the previous paragraph, this aspect of the rule will not be further discussed here.

(3) *Lack of competence to deal with matters not covered by the parties' submissions*

(a) *Scope of the rule.* The *non ultra petita* rule, in this aspect, contains both jurisdictional and substantive elements.

(i) *Jurisdictional elements.* A case may have been duly referred to a tribunal either by a *compromis* or special agreement, or other form of *ad hoc* consent; or the tribunal may have an inherent jurisdiction in respect of it, under a treaty or according to the optional clause declarations of the parties. But none of this means that the tribunal acquires a sort of roving commission in respect of the case. It is still confined not only to deciding that particular case and no other, but also to deciding the points (and no others) actually submitted to it by the parties, or necessarily covered by the scope of the dispute, as was made clear by the Court in a case dealt with in the previous cycle in this series,¹ when it stated (*I.C.J.*, 1950, 402) that it was not only the duty of the Court to reply to the questions set out in the final submissions of the parties 'but also to abstain from deciding points not included in those submissions'. This is a matter which, though fully capable of arising (as it did in the example just cited) where the case is referred to the tribunal by unilateral application,² finds its chief importance in the field of those cases which are referred to a tribunal by a *compromis* or special agreement, in which the parties will normally seek to define precisely, and thereby to limit, the issues to be determined by the tribunal. The point arose in this way in the *Minquiers* case, which illustrated very clearly not

¹ The *Asylum* case (Interpretation of Judgment)—see this *Year Book*, 29 (1952), p. 45.

² For even though one party has taken another to the tribunal, e.g. under a treaty disputes article, or by reason of applicable optional clause declarations, it will or should emerge clearly from the parties' respective submissions what are the points (and therefore, by necessary implication, what are *not* the points) which the tribunal is being asked to decide. This is one reason why the International Court has always attached such great importance to a precise formulation in proper form by the parties, of their respective final submissions in the case—see Division B, section (II) (1) below.

only the distinction between jurisdiction over the case as such, and competence to decide particular issues in that case, but also the way in which the *non ultra petita* rule may influence the substance of the eventual decision in the case.

(ii) *The substantive elements—Application of the rule in the Minquiers case*—The parties, by Article I of a special agreement or *compromis* had asked the Court

‘to determine whether the sovereignty over the islets and rocks (in so far as they are capable of appropriation) of the Minquiers and Ecréhos groups respectively belongs to the United Kingdom or the French Republic.’¹

On no less than three points the Court regarded this phrase as limiting and determining either the scope or the character of the decision it must give, or both:

a. ‘. . . whether the sovereignty . . . belongs to the United Kingdom or the French Republic.’ On the facts of the case, other theoretically possible positions might have been that the groups belonged to neither party (were *res nullius*), or to both (*condominium*). Moreover, one of the main French contentions in the case, had it otherwise been acceptable, might have led to the conclusion that the status of the groups was one or other of these. The Court held, however, that on the basis on which the matter had been put to it, it must determine that the sovereignty lay with one or other of the parties, adding (*I.C.J.*, 1953, 52):

‘By the formulation of Article I the Parties have excluded the status of *res nullius* as well as that of *condominium*.’

The view thus expressed clearly gives rise to the question (which also illustrates the principal difficulty involved by the *non ultra petita* rule) whether, supposing the Court had considered that the circumstances did not warrant an attribution of sovereignty to *either* party, and that the real status of the groups was, say, that of *res nullius*, it would (having regard to Article 53 of the Statute²) nevertheless have been justified, on the basis of this clause in the *compromis*, in attributing sovereignty to the party having the *better* claim of the two (even though this claim was not really sufficient *in abstracto* to confer title). The answer to this question involves considering what are the proper limits of the *non ultra petita* rule, and this is discussed in a later paragraph.

¹ For the full text of the relevant parts of the *compromis*, see the Judgment in the *Minquiers case* (*I.C.J.*, 1953, 49–50).

² Which implies that the Court should always be satisfied that a claim is well founded in law and in fact before pronouncing in favour of it. Although it can be argued that the primary purpose of this provision is to safeguard the position *in absentia* even of a State wilfully failing to appear, yet so to limit it would be clearly contrary to its spirit, and to the opening phrase of Article 38 of the Statute (which states that ‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it’) to place such a limited interpretation on it.

b. ' . . . the islets and rocks (in so far as they are capable of appropriation). . . . ' The Court ruled in effect that the bracketed phrase merely constituted a recognition of, or allusion to, the well-known rule of maritime law that drying rocks and other formations not permanently above high-water mark, do not generate any territorial waters and are not capable of appropriation in sovereignty,¹ and it thereby impliedly rejected an argument which, in one of its aspects, suggested that this phrase covered not merely physical but juridical capacity for appropriation, on which basis it was contended that the entire area of the disputed groups was not juridically capable of appropriation, because at a certain date the parties had entered into an agreement the effect of which was said to be that they mutually renounced, as against one another,² any claim to sovereignty over the groups, or at any rate agreed mutually not to assert it. Put in this way, the argument was clearly inconsistent with the request to the Court to find which (and therefore by implication *that*) one of the parties had sovereignty over the groups;³ and it was equally inconsistent with this request as tending towards a conclusion of *res nullius* or *condominium*.⁴ The Court found that the real purpose of the phrase 'in so far as they are capable of appropriation' was simply to absolve the Court from the necessity of considering the physical circumstances of each separate islet and rock, of which there were a great number, and to enable it to give a decision relating to each group as a whole, without regard to this factor. The Court said (*I.C.J.*, 1953, 53):

'These words must be considered as relating to islets and rocks which are physically capable of appropriation. The Court is requested to decide in general to which Party sovereignty over each group as a whole belongs, without determining in detail the facts relating to the particular units of which the groups consist.'

Here again, the same sort of difficulty as that noticed at the end of subparagraph *a.* above, might theoretically have arisen if it had been the case that *none* of the units of the group had been physically capable of appropriation in sovereignty, and the Court had had evidence of this before it. It is, however, hardly conceivable that, if this had been the position, the case would ever have been referred to the Court.

¹ This naturally does not apply to formations of this character actually within an existing belt of territorial waters drawn from a mainland or island coast. If situated within the territorial waters of the coastal State as so drawn, such formations are both under its sovereignty and generate an extension of those waters in the seaward direction; but there the process stops, since similar formations situated within the extension would remain incapable of appropriation or of generating further territorial waters—see this *Year Book*, 31 (1954), p. 394, and Articles 10 and 11 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.

² A renunciation of this kind would naturally not, as such, involve any renunciation *vis-à-vis* any third State which might seek to occupy the territory on the basis that it was a *res nullius*, although it might afford evidence that such was in fact its status.

³ See further subparagraph *c.* below.

⁴ See this *Year Book*, 32 (1955-6), pp. 46-48.

c. *The date applicable for the determination of sovereignty.* No date was specified, but it was obvious that what the parties wanted the Court to determine was which of them then had the sovereignty, i.e. at the date of the *compromis*. However, because of the principle of the critical date in disputes about the title to territory,¹ it did not follow that this determination depended on the situation as it stood at that date: it might be governed by the situation as existing at an earlier date—or, to put it in a technically more correct way, the situation as at the date of the *compromis* might itself depend on and be conclusively determined by the legal position existing at some earlier date. Several earlier dates were contended for by the French Government,² and amongst them the date of an Anglo-French Convention of 1839 regulating fisheries in the waters in which the groups were situated. It was contended that this Convention involved, *inter alia*, a mutual renunciation by the parties of any claim (as against one another) to sovereignty over the groups; or alternatively, that it had the effect that any acts in the nature of assertions of sovereignty or control over the groups, performed by either party after the date of the Convention, would not, as against the other party, rank as factors conferring or evidencing title. The consequence of this argument, if accepted, would have been to exclude from consideration everything that had occurred since 1839; and, if solutions in the nature of *res nullius* and *condominium* must also be excluded, it would mean that the question of which party had the sovereignty in 1950 (the date of the *compromis*) would depend on which had it in 1839 (the date of the Convention concerned). The Court rejected this contention on several grounds,³ one of them being that it was inconsistent with the *compromis*. The finding stated (I.C.J., 1953, 59):

‘Nor can the contention that the Court should determine to which Party sovereignty belonged in 1839, be considered as consistent with the Special Agreement of 1950, by which the Court is requested to determine to which Party sovereignty belongs at present.’

It must be assumed that the Court which, in respect of certain other dates between 1839 and 1950, admitted the possibility that one of them might constitute the ‘critical date’ for the determination of sovereignty, was not intending in this passage to deny the general proposition that a decision as to where title lies at a given date, may be governed by and depend on the legal situation existing at an earlier date.⁴ The Court must evidently have considered that the terms of the *compromis*, viewed against the background

¹ For a full discussion of this topic, see this *Year Book*, 32 (1955-6), pp. 20-44.

² Because the earlier the date was set, the better the French chances would be, as most of the later activity on or relative to the groups had been British.

³ For the Court’s statement of these, see the Judgment in the *Minquiers* case, I.C.J., 1953, 58-59.

⁴ See article cited in n. 1 on this page, above, section (2) (a) on pp. 22-24.

of the case as a whole, excluded the possibility that the parties could have intended their rights as they stood in 1950, to be determined by reference to the situation existing in 1839—an outcome that would have excluded several of the most important elements in the case. Here again a query arises. In the *Minquiers* case, the Court had several other reasons for rejecting the whole French contention respecting the effect of the Convention of 1839.¹ But suppose this had not been the case, and that the Court had considered this Convention indubitably to have the effect contended for by the French Government. Could it then have rejected the French contention solely on the ground that it was inconsistent with the *compromis*? Perhaps the answer is that in those circumstances the Court might have felt it necessary to interpret the *compromis* differently. But in any case, these various points call for some discussion of the limits of the *non ultra petita* rule.

(b) *Evaluation of the rule—its limits.* The *non ultra petita* rule is not only an inevitable corollary—indeed, virtually a part of the general principle of the consent of the parties as the basis of international jurisdiction—it is also a necessary rule, for without it the consent principle itself could constantly be circumvented. It was doubtless for this reason, *inter alia*, that, in the second phase of the *Asylum* case (Interpretation of Judgment), considered in the previous cycle of this series, the Court said that it was by the submissions of the parties that ‘the limits of the Judgment’ were ‘fixed in advance by the Parties themselves . . .’.² Even if the absence of such a rule might be unlikely to lead to a tribunal assuming jurisdiction over a dispute which had not, in one way or another, been referred to it by the parties, it might well result in enlargements of existing jurisdictions beyond the scope of the consents given, and to the tribunal determining or pronouncing on issues, or on aspects of the dispute, not submitted to it by the parties. There would clearly not be much point in insisting that international tribunals can only exercise jurisdiction on the basis of the consent of the parties, if (even though the dispute itself fell within the scope of that consent) it were then possible to introduce, and for the tribunal to take cognizance of, other issues which, if perhaps not wholly unconnected with the case, were extraneous to its true substantive content as defined in the *compromis* or other relevant instrument (treaty, declaration, etc.); or if the tribunal could go beyond the submissions which the parties had themselves made in relation to the dispute. It is nevertheless clear from the applications of the *non ultra petita* rule made in the *Minquiers* case (and it is not suggested that these were otherwise than perfectly correct in the circumstances), that unless the rule is applied with some discrimination, and unless certain distinctions are drawn, there is a danger that it might hamper the tribunal in coming to a correct decision, and might even cause it to arrive at a legally incorrect one, by

¹ See above, reference in n. 3, p. 102.

² *I.C.J.*, 1950, 403.

compelling it to neglect juridically relevant factors. It is therefore necessary to try and establish the limits of the rule, although this is not altogether easy, since in the nature of the subject there are likely to be borderline cases. The point may arise in respect both of jurisdictional issues and issues of merits.

(i) *Jurisdictional issues*. It seems clear that in respect of objections to the tribunal's jurisdiction in relation to the dispute as such, the rule can hardly have any application at all.¹ Two points may be noted here:

a. In the first place, if it did, it would run clean counter to the rule² that an international tribunal 'cannot regard a question of jurisdiction solely as a question *inter partes*'—an aspect which 'does not exhaust the matter'—and that the tribunal 'acting *proprio motu*, must be satisfied that any State which is brought before it . . . has consented to the jurisdiction'.³ This necessarily involves that the tribunal is not bound by or confined to the jurisdictional issues raised, or objections taken, by the parties; and that it can raise or take, and act upon, such issues or objections on its own initiative. Since the tribunal is bound always to satisfy itself that it has jurisdiction in the case—this is clearly implied by Article 53 of the Charter⁴—it follows inevitably that it can take jurisdictional objections, even though neither of the parties have done so. No doubt such cases are rare,⁵ and the position is often masked by the fact that, even if jurisdiction does not exist on the basis on which the case has actually been referred to the tribunal, the failure of either party to take any jurisdictional objection may enable *ad hoc* consent to the tribunal dealing with the case to be presumed. A more difficult situation arises where jurisdictional objections are taken which the tribunal does not consider to be well founded, but where there are others, considered to be valid by the tribunal, which the defendant party has *not* taken. In such cases, if the objection is not of too fundamental a character, it may be possible for the tribunal to deduce from the circumstances and the attitude of the parties that they are agreeable to the tribunal exercising jurisdiction despite this objection, provided that no other important ground of objection exists. But obviously the tribunal must be free to decide otherwise, should it think fit.

b. Assuming that, at the jurisdictional stage—although the tribunal will be guided primarily by the parties' submissions as to the exact character of the jurisdictional point it has to decide—it cannot be confined to these, then the *non ultra petita* rule, in its strict application, becomes essentially a rule that assumes the existence of substantive jurisdiction in

¹ Rosnène, *op. cit.* in n. 2, p. 8, above, at p. 329, recognizes this expressly in regard to the Court's faculty to indicate interim measures *proprio motu* (see subsection (II) (2) (a) below). But the point is, of course, of general application to jurisdictional issues.

² See § 1 (II) (1) (b) above.

³ *Per* Lord McNair in the *Anglo-Iranian Oil* case—see full quotation in § 1 (II) (1) (b) above.

⁴ See n. 2, p. 100, above.

⁵ See quotation from Rosnène in § 1 (II) (1) (b) above.

respect of the case *as such*. What it then provides is that although the tribunal has jurisdiction to hear and determine the dispute, yet in doing so it may not decide questions not referred to it, or go beyond the submissions of the parties. If no jurisdiction at all exists, then *cadit quaestio*.

(ii) *Issues of merits*. What may be a question of some difficulty is involved here; for just as a tribunal ought not to determine a case unless it is satisfied that it has jurisdiction to do so, so also ought it not to give a finding in favour of a party unless it considers that party's case to be well founded in fact and in law.¹ This leads to two questions.

a. The first, and easier, concerns the right of the tribunal to take points of fact or of law on the merits, *proprio motu*. Suppose, for instance, that the tribunal perceives a flaw in one party's case which the other party has not drawn attention to, and about which there has been no argument before the tribunal.² It is clearly necessary, if justice is to be done according to law, to distinguish carefully between (i) those cases in which the tribunal, though possessed of jurisdiction in respect of the dispute as such, proceeds to decide issues not covered by the dispute or by the *compromis* (where there is one), or which (as the Court said in the *Asylum* case) involve 'deciding points not included in [the parties'] submissions'; and (ii) those cases in which, precisely in order to deal correctly with an issue that *has* been referred to it, or to decide points duly covered by the parties' submissions, the tribunal makes use of arguments, or bases itself on considerations of fact or of law, other than those relied upon by the parties. In the first case the *non ultra petita* rule applies. In the second, it cannot: the fundamental principle that the tribunal must decide in accordance with international law precludes its application, and the maxim *jura novit curia* implies that the tribunal both knows and will apply the law, whatever the parties say, or omit to say.³ No doubt a tribunal which proposes to base itself, either wholly, or to any extent potentially determinant of the issue, on a point not taken or argued by the parties, will normally (as it certainly should) afford them an opportunity of being heard on that point;⁴ but subject to that, its right and duty to decide in accordance with its own estimate of the facts and the law cannot be doubted.

b. The more difficult case, entailing some qualification of what has just been said, arises where a tribunal is asked not only to determine a given dispute, but to determine it on a specified basis, or on certain assumptions agreed between the parties, and set out by them in the *compromis* or other

¹ See Article 53 of the Statute quoted in § 1 (II) (1) (b) above.

² In Anglo-Saxon or common-law courts, this situation can hardly arise, because of the court's habit of interrupting counsel, drawing their attention to any points the court regards as important, and putting questions to counsel.

³ So far as the International Court is concerned, this is the whole object and effect of Article 38 of the Statute.

⁴ As to this, see Division B below, section (II) (3).

applicable instrument. The Court gave effect to something analogous to this when, in the *Minquiers* case, it referred to a clause in the *compromis* which stated in what order the written pleadings were to be filed but also that this order was to be 'without prejudice to any question as to the burden of proof'.¹ In these circumstances the Court stated (*I.C.J.*, 1953, 52) that, having regard *inter alia* to the terms of this provision,

'... the Court is of opinion that each Party has to prove its alleged title and the facts upon which it relies.'

It would seem that there is no reason why an international tribunal should not give a decision on the basis of certain arbitrary postulates or assumptions—even if this may lead to a result at variance with the correct legal situation considered purely *in abstracto*—provided that three conditions are satisfied, namely (i) that the parties are agreed upon it and clearly request or indicate it; (ii) that the tribunal itself makes plain the basis of its decision, and the fact that it is based on certain assumptions; and (iii) that the legal rights (if any) of third parties are not prejudiced thereby, or it is made clear that they remain unaffected.² For instance, in the first of the three examples taken from the *Minquiers* case,³ there would seem to be no reason why, in view of the relevant clause of the *compromis*, the Court should not have decided in favour of whichever party had the better claim irrespective of whether this claim would *in abstracto* have sufficed to support a title to sovereignty, *provided* no claim by any third State was in their field, or, if in the field, did not appear to be as good or better.⁴ Again if, there being no other claimant in the field, two countries refer a territorial dispute to arbitration or adjudication on the basis that all events occurring before a certain date are to be excluded from consideration, there is in principle no reason why the tribunal should not decide the case on that basis, even if it thinks that, had these events not been excluded, there might have been grounds for a different conclusion. In some cases of this kind, even though third party rights are involved, it may be sufficient to make it clear that the decision is without prejudice to those rights (which, of course, it would in any case be, as a matter *res inter alios acta*). If, *per contra*, the parties have not specifically requested the tribunal to decide the case on a basis excluding certain facts or events, but have merely argued it without much or any

¹ *I.C.J.*, 1953, 52.

² The principle *res inter alios acta*, coupled with the provisions of Article 59 of the Statute, would in any case ensure this; but even the appearance of any contrary possibility ought to be avoided.

³ See subparagraph (a) (ii) *a* above.

⁴ All the more would the Court have seemed entitled so to act, if necessary, in that since the decision of the Permanent Court in the *Eastern Greenland* case (Series A/B, No. 53, p. 46), it is well established that 'particularly... in the case of claims to sovereignty over areas in thinly populated or unsettled countries'—this applied very aptly to the *Minquiers* and *Ecréhos* groups—'very little in the way of the actual exercise of sovereign rights' may be needed 'provided that the other State could not make out a superior claim'.

reference to those facts or events, or made no submissions regarding them, then the tribunal can, and indeed must, nevertheless take them into account in reaching its decision, if it considers that they definitely affect the legal position. Similarly, in the case of the third of the examples from the *Minquiers* case (see subparagraph (a) (ii) *c* above), it would seem that had the Court considered that the Convention of 1839, on its language and true interpretation, unquestionably had the effect contended for by France, it would scarcely have been justified (merely on the basis of the somewhat neutral bearing of the *compromis* on this point)¹ in nevertheless ruling that the acts of the parties subsequent to 1839 were to be taken into account. As it was, however, the Court was fully justified in regarding the language of the *compromis* as reinforcing the view that the Convention of 1839 could not have the meaning or effect ascribed to it by France. All such points require to be determined on their merits, and it is difficult to lay down hard and fast rules in a field in which there must be many borderline cases.

(II) THE JURISDICTION TO INDICATE INTERIM MEASURES OF PROTECTION

(1) *Basis of the jurisdiction*

(a) *In the case of the International Court.* The jurisdiction to indicate interim measures of protection² is, so far as the International Court is concerned, part of the incidental jurisdiction of the Court, the characteristic of which is that it does not depend on any direct consent given by the parties to its exercise, but is an inherent part of the standing powers of the Court under its Statute. Its exercise is therefore governed, not by the consent of the parties (except in a remote sense³) but by the relevant provisions of the Statute and of the Rules of Court.⁴

(i) *Distinction between the preliminary and the consequential exercise of incidental jurisdiction.* The incidental jurisdiction in its various aspects,⁵ is called 'incidental' because it is a jurisdiction which the Court may be called

¹ The *compromis* did not actually specify that the determination must be on the basis of the situation as it existed at the date of the agreement submitting the matter to the Court, though its terms would imply that this was so, *provided* no element in the case pointed indubitably to the determination, as at that date, being itself dependent on the legal situation existing at an earlier date.

² Article 41 of the Statute speaks actually of 'provisional measures' which 'ought to be taken to preserve the respective rights' of the parties. But Article 61 of the Rules of Court, which is entitled 'Interim Protection', uses the term 'interim measures of protection'. This was also the phrase consistently used by the Court and by the dissenting Judges in the *Anglo-Iranian Oil* case (Interim Measures).

³ That is to say, they have agreed to the Statute, and, *via* Article 39 of the Statute, to Articles 61 and 63-66 of the Rules of Court.

⁴ See in particular, such provisions as Articles 41 and 60-63 of the Statute, and Articles 61 and 63-66 of the Rules of Court.

⁵ The main types of 'incidental' jurisdiction, besides that relating to interim measures, are in respect of counter-claims, third-party interventions, the control of the proceedings, and the interpretation and revision of judgments.

upon to exercise as an incident of proceedings already before it. But, as the *Anglo-Iranian Oil* case clearly showed, this jurisdiction is not necessarily—any rate so far as the indication of interim measures is concerned—incidental to a *substantive* jurisdiction¹ already possessed by the Court in respect of the dispute as such, in the sense that it cannot be exercised unless the Court does possess substantive jurisdiction in respect of the merits of the case. This position suggests the distinction now to be noted.

a. *The 'preliminary' exercise of incidental jurisdiction.* Independence of the existence of *substantive* jurisdiction in the case, at any rate *initially*,² is a peculiarity which the jurisdiction to indicate interim measures shares with the jurisdiction of the Court to determine its own jurisdiction (the *compétence de la compétence*).³ The latter, strictly, is equally an instance of incidental jurisdiction, since it is specially and independently provided for (that is independently of any *ad hoc* consent of the parties) by Article 36, paragraph 6, of the Statute; and it must also (in the nature of the case) be exercisable independently of the question of substantive jurisdiction over the merits of the dispute. This is because the existence of that jurisdiction, if challenged, is the very issue that has to be determined by (and cannot be determined without) the exercise of the *compétence de la compétence*. In the same way, the need for an indication of interim measures is essentially liable to arise as a 'pre-preliminary issue'⁴ (that is, as a preliminary and not a substantive issue of jurisdiction). For the whole purpose of the eventual exercise of substantive jurisdiction in the case (if it exists, and it cannot at that stage be assumed that it does not) would be defeated—or at any rate might be prejudiced—if interim measures necessary to preserve the rights of the parties, as ultimately found by the Court, could not (when necessary) be indicated in advance of the determination by the Court of its substantive jurisdiction in the case. It is therefore essential that the Court should be able to deal with the matter, independently *at that stage* of whether it has substantive jurisdiction to determine the merits, and without as yet having to form any definite view on the question of its substantive jurisdiction in the case. There is, however,

¹ As indicated in § 1 (II) (3) (d) (i) and (ii) above, the term 'substantive jurisdiction' is used herein to denote jurisdiction in respect of the merits of the case.

² 'Initially', because if the Court eventually finds that it has not got jurisdiction to determine the merits, the interim measures will, as from that moment, be 'raised', as happened in the *Anglo-Iranian Oil* case—see Judgment, *I.C.J.*, 1952, at p. 114. The Order indicating interim measures was stated to cease to be operative as from the date of the Judgment, and the measures themselves to lapse 'at the same time'. The lapse was *not* therefore *retroactive*, which further emphasizes the fact that the Court's jurisdiction to indicate interim measures is independent of the question of its substantive jurisdiction in respect of the merits.

³ As to this see above, § 1 (II), *passim*.

⁴ This term, as explained in § 1 (I) (4) and (II) (3) (d) (i) and (ii) above, is used to denote issues which are preliminary to any question about the Court's substantive jurisdiction in respect of the merits—this being itself a 'preliminary' issue.

an important qualification to this position, which will be noticed in subparagraph (iii) below; and furthermore, it is obvious that although the Court may be able to *indicate* interim measures without having first to decide that it has substantive jurisdiction in the case, the measures themselves cannot eventually be *maintained* independently of the existence of that jurisdiction, and must therefore lapse or be cancelled should the Court eventually decide that it has no jurisdiction to determine the merits.¹ Another exercise of incidental jurisdiction which falls into the same category, and for the same sort of reason, is the power to decide on third-party requests for intervention under Articles 62 and 63 of the Statute. This jurisdiction must be exercisable even before the substantive jurisdiction of the Court in the case has been determined, for the intervention requested may be precisely on the question of whether that jurisdiction exists.²

b. Consequential exercise of incidental jurisdiction. The other main instances of the exercise of incidental jurisdiction by the Court, such as the jurisdiction to interpret or revise its judgments, to decide on counter-claims, etc., clearly involve matters which are in no sense preliminary, and indeed presuppose that the Court has at least determined whether it has substantive jurisdiction in the case; while some of them presuppose that the Court has actually exercised, or is exercising jurisdiction as to the merits. Where the Court is asked to revise or interpret a judgment involving a finding that it has no jurisdiction in respect of the merits, the jurisdiction it exercises in respect of the request for revision or interpretation is not independent of, but consequential upon, a determination (even if a negative determination) of the question of substantive jurisdiction.

(ii) *The Court and the question of the basis of the jurisdiction to indicate interim measures.* In the *Anglo-Iranian Oil* case (the only one in which the question of interim measures arose during the periods so far covered by this series), the position was that the Iranian Government had issued decrees nationalizing the petroleum industry in Iran, the practical effect of which was to expropriate the undertaking of the Anglo-Iranian Oil Company; for this Company (under a concession granted by the Iranian Government for a still unexpired term of years) was in fact the only entity, Iranian or foreign, engaged in the petroleum industry in Iran. Alleging this action to involve various breaches of international law, the United Kingdom Government had instituted proceedings before the Court by application, on the basis of its own and Iran's Optional Clause declarations accepting the compulsory jurisdiction of the Court; and a short time afterwards, it made a separate application requesting interim measures, the essential element of which was that, pending the final decision of the Court in the case, the

¹ As to this, and the question of retroactivity, see above, n. 1, p. 108.

² The question of third-party intervention is considered in section (III) below.

Company should in the meantime be allowed to carry on its undertaking undisturbed—for otherwise, because of the dislocation that would be caused, the loss of markets, and the deterioration of installations, the Company (even in the event of a favourable final decision by the Court) would only be able to resume operations at a loss, and under a serious disadvantage. In view of the urgency of the request, no written pleadings were exchanged, and the Court almost immediately ordered an oral hearing. At this hearing, Iran did not appear, but the Iranian Government (to which the texts of the two United Kingdom applications had as of course been communicated) sent a note to the Court asking it to reject the request for interim measures, on grounds which, while they in effect denied that the Court had any jurisdiction in the case, did not, at that stage, appear directly to raise the question of the non-application to the case of Iran's Optional Clause acceptance.¹ The first ground consisted of a somewhat obscurely worded objection, apparently to the effect that the United Kingdom Government had no *locus standi* to refer to the Court a dispute between a foreign Government and a private commercial company, even a British one. By the second objection, it was contended that the whole matter belonged exclusively to Iran's own domestic jurisdiction, and therefore fell, so to speak, outside all international jurisdiction. The Court dealt with the second of these contentions (the implications of which in respect of the domestic jurisdiction question have already been considered in an earlier article²) as follows (*I.C.J.*, 1951, 92-93):

'Whereas it appears from the Application by which the Government of the United Kingdom instituted proceedings, that that Government has adopted the cause of a British company and is proceeding in virtue of the right of diplomatic protection;

'Whereas the complaint made in the Application is one of an alleged violation of international law by the breach of the agreement for a concession of April 29th, 1933, and by a denial of justice which, according to the Government of the United Kingdom, would follow from the refusal of the Iranian Government to accept arbitration in accordance with that agreement, and whereas it cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of international jurisdiction;'

It will be seen from this, that the Court found that it sufficed if the matter did not clearly and *a priori* fall 'completely outside the scope of international jurisdiction', from which it follows that had it been clear *a priori* that the Court could have no jurisdiction in the case, interim measures could not have been indicated. But the Court did not consider at all the question of Iran's optional clause position (which involved the general question of Iran's consent to the exercise by the Court of jurisdiction in the case). This matter was never directly pronounced upon by the Court in the

¹ See explanation of this in § 1 (III) (2) (b) (ii) *b* and *c* above.

² See this *Year Book*, 32 (1955-6), pp. 79-81.

proceedings respecting interim measures;¹ and immediately after the passage quoted above, the Court added (*ibid.*, 93) that

‘. . . the considerations stated in the preceding paragraph *suffice* to empower the Court to entertain the request for interim measures of protection.’—[italics added].

It must therefore be assumed that the Court considered (or would, had it dealt directly with the point, have found equally) that its jurisdiction to indicate interim measures existed so long, at any rate, as it was not *apparent* that no sufficient consent had been given by the party concerned to the exercise of jurisdiction by the Court in relation to the dispute as a whole (i.e. the merits). Such a view would be entirely in accordance with those expressed in the analysis given in subparagraph (i) *a* and *b* above. *Per contra*, if the absence of the necessary consent was *apparent, a priori*, then the Court would not be able to indicate interim measures. This is a matter calling for some further consideration,² but it is in any event clear that the Court did not think that the mere fact that its jurisdiction in the case could be challenged by Iran on lack of consent grounds, had in itself any direct bearing on its power to indicate interim measures. It referred to ‘the general terms of Article 41 of the Statute’ and to ‘the power recognized by Article 61 . . . of the Rules of Court, to indicate interim measures of protection . . .’ and added (*ibid.*):

‘. . . the indication of such measures in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case, *and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction.*’—[italics added].

This case affords, therefore, a striking illustration of the, so to speak, ‘pre-preliminary’ or *a priori* character of the jurisdiction to indicate interim measures, and of the fact that such indication in no way implies that the Court considers itself, even on a provisional basis, to possess jurisdiction to determine the merits—for, in the next phase of the case, the Court in fact found that it did not possess such jurisdiction, so that the merits were never heard before the Court, and the interim measures that had been indicated were eventually cancelled. It will be seen that the essence of the Court’s position at the interim measures stage, was a refusal to anticipate its finding on the question of its substantive jurisdiction in the case, even to the limited extent of making a purely tentative or provisional pronouncement in favour of such jurisdiction. It was on this point in particular, that the two jointly dissenting Judges (Judges Winiarski and Badawi) disagreed with the Court. In their view, interim measures ought not to be indicated unless (without of course proceeding to any final determination of the matter) it appeared

¹ But although not directly raised by Iran in the interim measures proceedings the existence of a query respecting Iran’s optional clause position was already public knowledge.

² See paragraph (iii) below.

to the Court at least *probable* that it would have jurisdiction in respect of the merits. Drawing attention (*I.C.J.*, 1951, 96) to the fact that interim measures were 'exceptional in character, and in derogation of general rights', so that a tribunal asked to indicate them 'ought to examine the situation as a whole', they said:

'Clearly, it could not be claimed that, in the event of a challenge to its jurisdiction, the Court should finally pronounce on this question before indicating interim measures of protection; in such a case as this the request might well become pointless;¹ but the Court must consider its competence reasonably probable.'

They continued (*ibid.*, 97):

'The power given to the Court by Article 41 is not unconditional; it is given for the purposes of the proceedings and is limited to those proceedings. If there is no jurisdiction as to the merits, there can be no jurisdiction to indicate interim measures of protection. Measures of this kind in international law are exceptional in character to an even greater extent than they are in municipal law; they may easily be considered a scarcely tolerable interference in the affairs of a sovereign State. For this reason, too, the Court ought not to indicate interim measures of protection unless its competence, in the event of this being challenged, appears to the Court to be nevertheless reasonably probable. Its opinion on this point should be reached after a summary consideration; it can only be provisional and cannot prejudice its final decision, after the detailed consideration to which the Court will proceed in the course of adjudicating on the question in conformity with all the Rules laid down for its procedure.'

The two jointly dissenting Judges then said:

'We find it difficult to accept the view that if *prima facie* the total lack of jurisdiction of the Court is not patent, that is, if there is a possibility, however remote, that the Court may be competent, then it may indicate interim measures of protection.'

In this passage, the dissenting Judges stated very clearly the only basis on which even the Court, so to speak, would have considered itself to be unable to indicate interim measures.² They continued (*ibid.*):

'This approach, which also involves an element of judgment, and which does not reserve to any greater extent the right of the Court to give a final decision as to its jurisdiction, appears however to be based on a presumption in favour of the competence of the Court which is not in consonance with the principles of international law. In order to accord with these principles, the position should be reversed: if there exist weighty arguments in favour of the challenged jurisdiction, the Court may indicate interim measures of protection; if there exist serious doubts or weighty arguments against this jurisdiction such measures cannot be indicated.'

The answer to this contention has been given by an eminent commentator, who has pointed out that for the Court to find at this stage that it *probably*

¹ Presumably because such a final pronouncement must take time (written proceedings, oral proceedings, etc.), and by then the prejudice intended to be averted by the interim measures might have occurred.

² This point is further considered in paragraph (iii) below.

has jurisdiction, would equally involve an element of judgement, and indeed of commitment on the part of the Court.¹

(iii) *Limits of the jurisdiction to indicate interim measures.* The short point is whether, granted that the Court is not obliged to find that it has, or even probably has, substantive jurisdiction in the case, before indicating interim measures, could it indicate them if it was apparent *a priori* that it *could* not have such jurisdiction, in particular on account of the absence of the necessary consents. The answer to this must clearly be 'no', and such an answer is, indeed, as has been shown in subparagraph (ii) above, implicit in what the Court itself said in the *Anglo-Iranian Oil* case, even though it did not directly deal with the question of consent. This is also the view of both Sir Hersch Lauterpacht and Mr. Rosenne.² But there is room for some argument as to the basis on which it would be proper for the Court to find that its lack of jurisdiction was so obvious and apparent as to be clear beyond doubt; and as this must evidently depend very much on the circumstances, it is probable that no certain answer to the question can be given. Sir Hersch approaches the matter indirectly. In his view, the Court can always indicate interim measures

'... provided that there is in existence an instrument, such as a Declaration of Acceptance of the Optional Clause, made by both Parties to the dispute, which *prima facie* confers jurisdiction upon the Court and provided that there are no reservations to that instrument which clearly exclude the jurisdiction of the Court.'³

(Presumably other instruments such as jurisdictional clauses in treaties would serve equally well for this purpose.) It is, however, not an absolutely necessary inference from what Sir Hersch says, that there must be some definite instrument on the basis of which it is at least arguable that jurisdiction exists, although he does say that 'the Court⁴ has not acted on the view that it can indicate interim measures in all cases in which its jurisdiction on the merits is merely possible'.⁵ Rosenne puts the matter on a different and somewhat broader basis. After pointing out that Article 61 of the Rules of Court requires the existence of 'proceedings' in the case before interim

¹ Sir Hersch Lauterpacht in *op. cit.* (in n. 4, p. 10, above), pp. 255-6, says that: 'Any such finding [i.e. that the Court probably has jurisdiction] would, at least to some extent, commit the Court as to its final decision—a result which the Court has repeatedly and expressly disclaimed'—and in a footnote (n. 42 to p. 255) he continues: 'The Court would be committing itself to some extent for it would be naturally disinclined to find in the end that its assessment of the probability of its jurisdiction was incorrect. Moreover, any finding based on the assumption that its jurisdiction on the merits is *probable* presupposes a measure of investigation, in connection with an application for interim measures, which the Court cannot properly undertake at this stage. . . .'

² Rosenne, *op. cit.* in n. 2, p. 8, above, at p. 328, and Lauterpacht, *op. cit.* in n. 4, p. 10, above, at p. 111.

³ Lauterpacht, *ibid.*, p. 112.

⁴ A term used in both Lauterpacht and Rosenne to include also the Permanent Court.

⁵ The Court in fact came rather near to this in the *Anglo-Iranian Oil* case. What it found in effect was that since the subject-matter of the claim in the case did not *a priori* fall 'completely outside the scope of international jurisdiction', the Court could indicate interim measures.

measures can be indicated, and that anything constitutes proceedings which lies in the interval between the original application or submission instituting proceedings, and final judgment, he continues:

'However, if it is clear from the document instituting proceedings that the jurisdiction of the Court to hear the case on its merits requires, for its perfection some successive step on the part of the respondent State, and that step has been refused, then . . . there will be no "proceedings",¹ and consequently no inherent jurisdiction to indicate provisional measures, until the jurisdiction over the merits has been perfected.² The position might be otherwise so long as it is not clear whether the respondent has refused the invitation to accept the jurisdiction of the Court. . . .'³

This last suggestion may go somewhat too far, for it would not only enable the Court to indicate interim measures in a case in which it was clear that, *at that moment*, it had no jurisdiction, but to do so on the strength of a purely hypothetical possibility that it might thereafter acquire it on a basis of *forum prorogatum*. The matter is a difficult one, but the best view appears to be the one in effect suggested by Sir Hersch Lauterpacht who draws attention to the dangers of too great a freedom to indicate interim measures. According to this view, it is not sufficient to confine refusal of interim measures to those cases in which it is clear that the Court has not, and never could, in the extant circumstances, have jurisdiction. Such a refusal should also extend to cases where the possibility that there is, or may be, jurisdiction, is too remote or hypothetical to justify the indication of interim measures. In short, there must be *some* solid basis (be it a relevant instrument or otherwise) on the strength of which there are genuine grounds for contending that the Court *may* have jurisdiction—grounds going beyond a bare possibility; for, as Sir Hersch says, to indicate interim measures 'in all cases in which . . . jurisdiction is merely possible', would be

' . . . to open the door to abuse by enabling States with no more than a flimsy claim to the jurisdiction of the Court to obtain an interim Order limiting severely and for a relatively prolonged period the freedom of action of the State concerned.'⁴

He continues:

'This is so although, in strict law, there is no obligation to comply with the provisional Order.⁵ For a Government similar to the reactions of public opinion and mindful of its own reputation will not lightly disregard an Order of the highest judicial organ of the United Nations—although, it may be added, it was so disregarded in the

¹ Presumably, the reasoning is that if the step in question has been 'refused', the lack of jurisdiction in the circumstances is clear *a priori*, and there can be no proceedings, even for the purpose of considering interim measures. An evident lack of any intention of taking the step in question could also operate as a 'refusal' for this purpose.

² However, if there has already been a 'refusal' in the sense of n. 1 on this page, this can *ex hypothesi* not occur.

³ Op. cit., p. 328.

⁴ Op. cit., p. 111.

⁵ The author qualifies this view on the next page of his book, and still more extensively in a later passage—see subsection (3) below.

case of the *Anglo-Iranian Oil Company*, the principal case in which this provision of the Statute [i.e. Article 41] was applied.'

(b) *The jurisdiction of tribunals other than the International Court to indicate or order interim measures.* This is a matter on which there is little definite authority. The case is, of course, clear where, by the instrument setting up the tribunal, or under which it acts (be it a treaty clause, or a *compromis* or special agreement arrived at between the parties to the dispute), the tribunal is specifically given power to indicate or order interim measures of protection; and in such cases, curiously enough, it may be easier than it is in the case of the Court¹ to argue that any interim measures indicated are binding on the parties, though this will depend on the exact wording employed in the treaty or special agreement. But the real question is whether, in the absence of any such express faculty, or its conferment on the tribunal by the parties in the course of the proceedings (either by express acquiescence or non-objection to its exercise), the tribunal would, as a matter of principle, possess any *inherent* jurisdiction to indicate interim measures, if it considered the interests of justice so required—an inherent jurisdiction exercisable in the absence of any direct consent by the parties, or even in the face of objection by one or both of them. To this question no certain answer can be given. But the arguments for and against the existence of any such inherent jurisdiction can be stated. It will be convenient to start with those against.

(i) *Arguments against the view that any international tribunal possesses an inherent right to indicate interim measures.* These might be stated as follows:

a. The inherent jurisdiction of the Court is clearly regarded, both by the Court itself, and by commentators, as springing from the express power to that effect conferred by the relevant provisions of its Statute and Rules of Court. In the absence of these provisions, it may be argued (although the argument obviously begs the question to some extent) that the Court would not have this power: and therefore, *a fortiori*, other tribunals could not have it either, unless the parties expressly provide for it.

b. As the two jointly dissenting Judges in the *Anglo-Iranian Oil* case pointed out,² the power to indicate interim measures is a somewhat drastic one, which may have considerable repercussions. Quite apart therefore from any question of whether, even if exercisable, it ought in a given case to be exercised, it should only be exercisable where the faculty has clearly been conferred by some clause in the tribunal's terms of reference, or by other definite act of the parties.

¹ See subsection (3) (a) below.

² *Per* Judges Winiarski and Badawi in *I.C.J.*, 1952, 96. Sir Hersch Lauterpacht (*op. cit.*, p. 110) equally says that '... compliance with the Order [sc. indicating interim measures] may prevent the defendant State—conceivably for a prolonged period—from exercising its legitimate rights in a matter with regard to which the Court may eventually find that it has no jurisdiction.'

(ii) *Arguments in favour of a general inherent jurisdiction to indicate interim measures.* The arguments *against*, as outlined above, are clearly weighty. In the present state of international affairs they must probably prevail, although it is not intended to express any final opinion as to that here. But the arguments in favour of the contrary view are, purely on a basis of logic and principle, even weightier. They are as follows:

a. It can be maintained with great force that *the very reason why* the Statute of the Court provides for the indication of interim measures, is that such a power is necessary in order to ensure that justice is done and that the eventual decision of the Court on the merits is not stultified by intermediate action on the part of one or other party rendering such decision unenforceable or unavailing. In short, if there is ever any case at all for conferring this faculty expressly on an international tribunal (be it the Court or another), there is automatically a case for regarding all international tribunals as inherently invested with it.

b. In submitting a dispute to a given tribunal, whether expressly or by reason of some treaty clause, the parties must be held to have intended the tribunal to have all such powers as are necessary for the proper exercise and due discharge of its functions. For the reasons already stated, these must, or should, be held to include the power to indicate interim measures.

c. As has been shown above, the power of the Court to indicate interim measures falls into the same category as its *compétence de la compétence*. Both are an exercise of incidental jurisdiction,¹ necessary in the case of the *compétence de la compétence* to enable the Court to function at all, and, in the case of the power to indicate interim measures, to prevent its decisions from being stultified. Now in the case of the Court, its power to determine its own jurisdiction is specifically provided for by Article 36, paragraph 6 of the Statute. Yet it is established law² that this power is part of the inherent powers of *all* international tribunals, irrespective of whether it has been expressly conferred on them or not—a view specifically endorsed by the Court when it said in the *Nottebohm* case (Jurisdiction)³—that

'Paragraph 6 of Article 36 merely adopted in respect of the Court a rule consistently accepted by general international law in the matter of international arbitration . . . [namely that] an international tribunal has the right to decide on its own jurisdiction and has the right to interpret for this purpose the instruments which govern that jurisdiction.'⁴

It follows therefore, that the mere fact that a faculty is, in the case of the Court, specifically provided for in the Statute, is in no way conclusive on

¹ Although both are instances of incidental jurisdiction, the latter is so important, and in certain respects so complex, as to require treatment as a main jurisdiction (as herein)—and see in the same sense Rosenne, *op. cit.* in n. 2, p. 8, above, at p. 327.

² See above, § 1 (II) *passim*.

³ See § 1 (II) (2) (b) above.

⁴ *I.C.J.*, 1953, 119.

the question whether, despite the absence of a similar provision in the relevant instrument, such faculty would not also be attributable to other international tribunals. Indeed, it is obvious that many of the matters specifically provided for in the Statute must form part of the inherent powers of such tribunals, or they could hardly function at all.¹ The fact is that many of the provisions of the Statute are merely declaratory of pre-existing general international forensic practice. Whether the faculty to indicate interim measures comes under that head may be an open question. But if so, the considerations set out in the two immediately preceding subparagraphs above are highly material to the determination of that question, although they cannot be regarded as entirely conclusive, since the comparative rarity with which interim measures have been requested may throw doubt on the need for this faculty,² and has in any case prevented any considerable body of practice from being established.

(2) *Particular points relative to the jurisdiction to indicate interim measures.*

These points will be discussed mainly with reference to the International Court. They are, of course, equally liable to arise in connexion with other tribunals where, and if, these have jurisdiction to indicate interim measures at all; but some of them are less likely to do so. Where they do arise, the position should in principle be the same as in the case of the Court; but this cannot be assumed.

(a) *Right to act proprio motu.* This is a right specifically conferred upon the Court by paragraph 6 of Article 61 of the Rules of Court,³ and it was affirmed by the Court in the *Anglo-Iranian Oil* case when it said (*I.C.J.*, 1951, 93) that:

‘ . . . from the general terms of Article 41 of the Statute and from the power recognized by Article 61, paragraph 6, of the Rules of Court, to indicate interim measures of protection *proprio motu*, it follows that the Court must be concerned to preserve by such measures the rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent. . . . ’

From the last part of this passage, in which the power to act *proprio motu* is connected with the need to preserve the parties’ rights as determined by the Court’s final judgment, coupled with the fact that the power to act *proprio motu* is not contained in the Statute, but has, so to speak, been

¹ Such as the power to prescribe the steps to be taken by the parties for the presentation of their respective cases; to call for certain evidence; to rule on questions of the admissibility of evidence; and to control the conduct of the proceedings generally.

² But if, like some other things, they may not be required very often, when they are required, and perhaps precisely because they are required at all, the need for them is apt to be urgent—a situation recognized by Article 61 of the Court’s Rules.

³ Which provides that ‘The Court may indicate interim measures of protection *proprio motu*’, and that if the Court is not sitting, the President may convene it specially in order to consider the question whether they should be indicated.

conferred by the Court upon itself through its faculty (under Article 30 of the Statute) to make Rules of Court—and the further fact that the Court thought the matter sufficiently important to exercise the faculty in this respect—it may be inferred that the same power to act *proprio motu* would or ought to be possessed by any tribunal having jurisdiction to indicate interim measures at all. However, it must be at the least doubtful how far in such a case this power can be implied, in the absence of express conferment.¹

(b) *Object of interim measures of protection.* There may be more than one object, although it is not entirely clear that there ought to be.

(i) *Preservation of parties' respective rights pending final judgment in the case.* This object is clear from the passage quoted in the previous paragraph above, from which it seems to follow that, apart from the general object of preserving the parties' rights as finally determined by the Court, the object is to do so in the interests of *both* parties equally; and further that the main purpose of the power to act *proprio motu* is to ensure that the Court can always do this, and is not confined to doing so only if one of the parties so requests. It may be worth noticing in this connexion, that the passage quoted begins with a phrase (not reproduced in the previous paragraph above) which runs as follows:

'Whereas the object of interim measures of protection provided for in the Statute is to preserve the respective rights of the Parties pending the decision of the Court, and whereas from the general terms of Article 41 . . . etc.'

This at first sight merely seems to say the same thing, but it applies to the general power to indicate interim measures, and is not, like the ensuing phrase, directly linked to the power to do so *proprio motu*; nor does it emphasize so strongly as that phrase does, the duty of the Court in respect of *both* parties. This therefore tends to bear out the view expressed above as to the object of the jurisdiction, and in particular of its exercise *proprio motu*, and further confirmation of this is afforded by what is stated in paragraph (c) below.

(ii) *Promotion of a settlement of the dispute.* This, as a possible object of the power to indicate interim measures, will more conveniently be dealt with in paragraph (d) below.

(c) *The Court is not confined to indicating the actual measures requested by the party applying for them.* This is another matter specifically provided for by Article 61 of the Rules, in its paragraph 4.² Its main objects might be stated as follows:

(i) *To secure impartiality as between the parties.* It is evident that if the

¹ The point involves considerations very similar to those stated in subsection (1) (b) above; but that case contemplated not action *proprio motu* but at the request of one of the parties, though in the absence of consent by *both* parties that the Court should entertain the request.

² This provides that 'The Court may indicate interim measures of protection other than those proposed in the request.'

Court were confined simply to approving or disapproving the measures suggested by the requesting party, it might be unable to do justice as between the parties, or in the case generally. Approval might prejudice the interests of the other party; but equally, outright disapproval might be unfair to the requesting party which, while not considered entitled to what it asked for, might be considered to be entitled to something other or something less.

(ii) *To avoid prejudging issues of jurisdiction or merits.* A further reason for enabling the Court to vary the measures suggested, or to indicate different ones, is that in some cases the Court might be unable either to accede to or reject the request, as framed, without to some extent prejudging questions of substantive jurisdiction or merits. In relation to both the above-mentioned objects the following points may be noted:

a. Neither was specifically referred to by the Court in the *Anglo-Iranian* case, but, while making no allusion to the matter beyond what may be implied from the passages already quoted, the Court did in fact indicate interim measures differing very considerably from those requested, and, while conceding in some degree the main measure asked for by the United Kingdom, namely, that the Anglo-Iranian Oil Company should be allowed to carry on with its undertaking in Iran pending final judgment, did so subject to conditions, and on the basis of proposed arrangements, which entirely altered the emphasis and approach of the original proposals.¹

b. Both the objects above noticed are as important in the case of other international tribunals as in that of the Court, and therefore, in principle, if a tribunal has jurisdiction at all to indicate interim measures, it ought to have the same power to indicate measures other or different from those requested. The matter is indeed fundamental to the proper administration of justice, having regard to the dangers above described if the necessary freedom is not possessed by the tribunal. However, in view of the very strong part that the direct *ad hoc*, consent of the parties plays in the case of all tribunals whose powers are not specifically provided for in advance by a standing instrument, it may be thought that the requesting party should have a right of election, that is of either accepting the measures proposed by the tribunal, or withdrawing the request altogether. But in the latter event, it would seem that the other party must have the right formally to put forward (as constituting its own request) a plea for the application of the measures proposed by the tribunal.

¹ The measures proposed and requested by the United Kingdom were directed quite simply to maintaining the *status quo* intact, during the period elapsing before the final judgment of the Court, so that the Anglo-Iranian Oil Company's undertaking would in the meantime continue as if the Iranian nationalization decrees had not been made. The Court's measures took the existence of these decrees into account, and proposed a joint Iranian Oil Authority/Anglo-Iranian Oil Company régime for running the industry in the intervening period.

(d) *Inadmissible objects of the jurisdiction to indicate interim measures.* It is, of course, not possible to give an exhaustive list of these: the matter is, rather, governed by the positive requirement that the object is to preserve the rights of the parties as finally adjudged by the tribunal. But the following cases may be noticed.

(i) *Taint of finality.* It is obvious that the measures must be purely provisional, and basically conservatory in character. Their object is to preserve, not to confer rights, and they must not therefore amount to an interim judgment in favour of the applicant party, or indeed of either party.¹

(ii) *Promotion or facilitation of a settlement of the dispute.* The function of a legal tribunal is to give a decision determining the rights of the parties, and normally it is no part of its functions to try and bring the parties together or to promote a settlement. A legal tribunal is not a conciliation commission, and though it exists in order to settle the dispute, it also exists precisely in order to settle it by other means than conciliation. For the tribunal not to proceed accordingly, would indeed amount to acting on a basis *ex aequo et bono*, without the parties having consented to such a basis of jurisdiction. Any idea that it is legitimate to make use of the power to indicate interim measures in order to promote or adumbrate a settlement must therefore be rejected as lying outside the functions of a legal tribunal not empowered to act *ex aequo et bono*.² It is true that, as Sir Hersch Lauterpacht says, the Court in the *Anglo-Iranian Oil* case used its powers 'in a constructive fashion which revealed in a significant manner the potentialities of its jurisdiction in this sphere', and that in addition to measures designed to prevent either party prejudicing the position of the other, 'it laid down the details of a provisional régime for the oil industry in Iran'.³ It is also true that this régime, had it been put into effect, might have formed the basis of, or constituted a starting-point for an eventual compromise solution, or might at least have led to negotiations (such as had taken place when the Iranian Government cancelled the Company's previous ('D'Arcy') concession in 1932, and the United Kingdom brought the matter before the Council of the League of Nations)⁴—and it is not impossible that the measures indicated by the Court may have been viewed by some in that light. But it is suggested that the real explanation is different. Legal tribunals cannot adumbrate settlements unless they are specifically requested by both parties to do so, though, as will be seen later,⁵ it may not be outside the proper scope of their functions to give expression

¹ See the *Chorzów Factory* case (Interim Measures) before the Permanent Court, Series A, No. 12, at p. 10.

² Consideration is given later (see subsection (IV) (2) below) to the analogous but distinct question of judicial recommendations, suggestions, or *vœux*.

³ *Op. cit.* in n. 4, p. 10, above, at p. 256.

⁴ See as to this, the article in this *Year Book*, 33 (1957), § 1 (1) on pp. 238–50.

⁵ See below, pp. 133–7.

to recommendations, suggestions or *voeux*. But in view of the obvious difficulties of enforcement, and of the doubt whether interim measures are even technically binding on the parties¹—and also in order to preserve the full appearance of impartiality—any tribunal indicating such measures can hardly be blamed if it has some regard not merely to their abstract necessity or desirability, but also to their effect on the mind of the party which will be called upon to carry them out; and if also, while aiming to achieve the main object of preserving the parties' rights, it endeavours to make the measures palatable and acceptable to both parties, particularly in so far as they have to be carried out in the actual territory of one of the parties, or involve questions of national prestige. To do so is indeed the best means of securing that the measures will be duly carried out, and although this object was not achieved in the *Anglo-Iranian Oil* case, there is no need to look beyond these considerations in order to account for the type of measures indicated by the Court in that case.

(iii) *Avoidance of 'incidents'*. It has been suggested² that interim measures ought not to be indicated merely in order to avoid incidents which may increase tension between the parties and possibly endanger international peace and security. This is not the function of the Court, it may be said, and other organs of the United Nations, or means of recourse, exist for such purposes. There is an element of truth in this view; but the attitude of the Permanent Court in the *Eastern Greenland* case, often cited in support of it, really rested on a different basis. The Court refused to indicate measures for the prevention of incidents in or relative to the disputed territory because, from the moment the dispute had been submitted to the Court, the acts of the parties could no longer affect the legal position one way or the other. Consequently, the eventual legal rights of the parties, as they would be determined by the Court's final decision, could not be prejudiced by any 'incidents'. In short, the criterion the Permanent Court applied was, correctly, whether or not the suggested interim measures were *necessary* in order to preserve the rights of the parties. But supposing that in the *Eastern Greenland* case the anticipated incidents had been of a more drastic kind, and, if allowed to take place, might have permanently affected the value of the territory, e.g. by the destruction or serious reduction of natural fauna (whales, seals, etc.), the outcome would probably have been different. The issue does not really turn therefore on the avoidance of incidents as such and *per se*. This admittedly, is not the real point. The Court, or indeed any international tribunal, is not directly a peace-preserving institution, except in so far as the simple fact of its existence, and the discharge of its functions,

¹ See paragraph (3) below.

² See Lauterpacht, *op. cit.* in n. 4, p. 10, above, at p. 253, and Rosenne, *op. cit.* in n. 2, p. 8, above, at p. 330.

contributes (and contributes greatly) to that end. But in the direct sense, the Court is a 'right' rather than a 'peace' preserving institution, and the essential question is therefore whether the avoidance of incidents, or of certain types of incidents, is necessary in order to preserve, or to make sure of preserving the rights involved—or to avoid prejudice to them. If certain action by one party, either in itself, or because it is liable to lead to counter-action by the other, with similar effect, appears likely to prejudice the eventual decision of the tribunal, e.g. by the destruction or impairment of the *res*, or otherwise, a case for the indication of interim measures exists.

(3) *Are orders indicating interim measures binding?*

(a) *As regards the Court.* As the Court has not pronounced on this matter, and is perhaps unlikely to have to do so,¹ it is not proposed to discuss it here except summarily, despite its obvious importance. To do more would involve going into some difficult points of interpretation arising on Articles 41 and 59 of the Statute, and Article 94 of the United Nations Charter;² and even so, because of the uncertainties and inconsistencies involved, the result would necessarily be inconclusive. What can be asserted with some confidence is that the doubts as to the binding character of an indication of interim measures by the Court, are due wholly to the language of the above mentioned provisions, and would not otherwise (or as a matter of principle) exist. The whole logic of the jurisdiction to indicate interim measures entails that, when indicated, they are binding³—for this jurisdiction is based on the absolute necessity, when the circumstances call for it, of being able to preserve, and to avoid prejudice to, the rights of the parties, as determined by the final judgment of the Court. To indicate special measures for that purpose, if the measures, when indicated, are not even binding (let alone enforceable⁴), lacks all point, except in so far as the

¹ It seems clear that an Order indicating interim measures is not, technically, a 'judgment', and the power of the Court under Article 60 of the Statute to interpret its decisions, and pronounce on their effects, is limited to the case of 'judgments'. As in the third phase of the *Asylum* case therefore (the *Haya de la Torre* case—though on a different point (see section (IV) (1) below)), the Court could only deal with the matter if it had an independent basis of jurisdiction for doing so, e.g. the direct consent of the parties; or if an application to it were possible under optional clause declarations, or a treaty settlement of disputes clause.

² For an interesting discussion of the whole matter, see Rosenne, *op. cit.* in n. 2, p. 8, above, at pp. 102–15, more particularly at pp. 109–12.

³ In addition, if they were not, they would, *in practice*, have a lesser status than that of other interlocutory orders of far smaller importance—for almost all other interlocutory orders are self-enforcing in the sense that a party disregards them at its peril as respects the outcome of the case; but this is not the position with reference to interim measures, as the *Anglo-Iranian Oil* case showed.

⁴ Even a final judgment of the Court is not directly enforceable in the strict sense of the term, e.g. through an independent authority, except in so far as the Security Council, acting under Article 94, para. 2, of the Charter, may see fit to take steps for that purpose; or except in so far as certain measures of self-help may become justified. For an exhaustive discussion of the whole matter, see Rosenne, *op. cit.*, chapter IV, pp. 73–116. The existence of the judgment may

parties may be expected to give a voluntary compliance to the Order of the Court.¹ Even so, such a position in no way accords with the urgency and importance so clearly and deliberately imparted to the matter by the language of Article 61 of the Rules of Court.² The essential point was cogently expressed as follows, by the United Kingdom representative in the Security Council, in the course of the proceedings consequent upon the non-compliance with the interim measures indicated by the Court in the *Anglo-Iranian Oil* case:

'... it is established that a final judgment of the Court is binding on the parties; that indeed is expressly stated by Articles 59 and 60 of the Statute, and Article 94, paragraph 1 of the Charter. But clearly there would be no point in making the final judgment binding if one of the parties could frustrate that decision in advance by actions which would render the final judgment nugatory. It is therefore a necessary consequence... of the bindingness of the final decision that the interim measures intended to preserve its efficacy should equally be binding.'³

Sir Hersch Lauterpacht also, though of course not speaking in his judicial capacity, and expressly disclaiming any intention of trying to give a final answer to the question, has pointed out the extreme inconsistency involved between, on the one hand, the nature of the jurisdiction to indicate interim measures, coupled with the way the Court has handled it; and, on the other hand, the notion that compliance with the measures involves no more than a moral obligation. Although, as he says, 'the language of Article 41 of the Statute precludes any confident affirmation of the binding force of the measures [indicated]... under that Article',⁴ yet

'It cannot be lightly assumed that the Statute of the Court—a legal instrument—contains provisions relating to any merely moral obligation, and that the Court weighs minutely the circumstances which permit it to issue what is no more than an appeal to the moral sense of the parties.'⁵

(b) *As regards other tribunals.* The full irony and unsatisfactory character of the position in regard to the binding character of interim measures indicated by the Court, is brought out by the fact that there need be very little doubt about the binding character of such measures where ordered by a tribunal *other* than the Court, assuming always that the tribunal in question possesses jurisdiction on one ground or another to indicate interim measures; for if, in the case of the Court, the doubts spring exclusively from

also justify certain steps (e.g. withholding money otherwise due to the State concerned, or placing an embargo on its property abroad), which may indirectly have the same effect. But lack of direct enforceability does not alter the *legally binding* character of a final judgment.

¹ And as the *Anglo-Iranian Oil* case showed, no reliance can be placed on this.

² And see also Lauterpacht, *op. cit.* in n. 4, p. 10, above, at pp. 110-11.

³ *Per* Sir Gladwyn Jebb, Security Council Records, S/PV 559, p. 20.

⁴ *Op. cit.*, p. 254.

⁵ *Ibid.* The author demonstrates very convincingly, here and elsewhere in his work, the care with which the Court deals with all jurisdictional and other preliminary questions.

the language of certain provisions of the Statute and Charter, then in the absence of these provisions or of others like them, the considerations of logic and principle discussed above would have unimpeded sway. In those cases in which the parties (e.g. under a *compromis*) expressly confer on the tribunal power to indicate interim measures, it is scarcely conceivable that they would do so in language implying, or which ought to be held to imply, the absence of any obligation to carry them out. Where no express power is conferred, and the jurisdiction if it exists at all is inherent,¹ there would *ex hypothesi* exist no provision involving such an impediment.

(III) THIRD-PARTY INTERVENTION

(I) *Basis and object of the jurisdiction*

(a) *In the case of the International Court.* The jurisdiction of the Court to entertain third-party interventions is another example of incidental jurisdiction, the general character of which has already been considered in connexion with the indication of interim measures,² and equally arises from the existence of express provisions of the Statute which confer this jurisdiction upon the Court and allow it to be exercised independently of the specific consent of the parties. Third-party intervention before the Court may be of two kinds.

(i) *Intervention by leave of the Court.* This is provided for by Article 62 of the Statute, for any case in which a State considers 'that it has an interest of a legal nature which may be affected by the decision in the case . . .'. Such a State may submit a request to the Court 'to be permitted to intervene', and it will then be 'for the Court to decide upon this request'.

(ii) *Intervention as of right.* This is provided for by Article 63 of the Statute, but exclusively in relation to cases involving 'the construction of a Convention to which States other than those concerned in the case are parties . . .'. It follows that the convention must be a multilateral, or at least a plurilateral, and not merely a bilateral one.³ It also follows that the State intervening must be a party to the convention, and this is indeed made clear by the fact that the Registrar of the Court is to 'notify all such States forthwith [i.e. parties to the convention] whenever a case arises; and that only 'Every State so notified has the right to intervene in the proceedings. . . .' The Article goes on to say ' . . . but if it uses this right, the construction given by the judgment will be equally binding upon it'. It is

¹ See subsection (1) (b) above.

² See section (II) (1) (a) above.

³ This presumably accounts for the use of the term 'convention' in Article 63, since the type of general multilateral instrument chiefly contemplated by this article, usually goes by the name of convention. However, the Article must be taken to cover multi- or plurilateral 'treaties', or any other multi- or plurilateral international agreement, however styled. On the question of nomenclature of 'treaties', see in this *Year Book*, 33 (1957), pp. 248-50.

actually not inconceivable that a State might have an interest in the construction of a multilateral convention, although it was *not* a party to it (e.g. it may be proposing to become a party; or it may be party to a similar convention, the interpretation of which may indirectly be affected). In that case, although having no right of intervention under Article 63, such a State can, as considering that it has 'an interest of a legal nature' 'which may be affected by the decision in the case', apply for leave to intervene under Article 62.¹ The reason for the distinction between the Article 62 and the Article 63 cases is clear. Where the construction of a convention is concerned, any party to it necessarily has an interest in the matter,² whether it chooses to exercise it or not, and even though (by reason of Article 59 of the Statute) the final judgment of the Court in the case would not, in the absence of intervention, be binding upon it. Where no international agreement is involved to which the State is a party, the question whether it has a legal interest of the kind specified by Article 62 must be a matter of appreciation, and it is for the Court to decide on it.

(b) *In the case of other international tribunals.* Normally, any right of third-party intervention, or faculty for the tribunal to allow it, would have to be specifically provided for by the parties to the dispute, or consented to by them *ad hoc*—generally the latter, as it would be rare indeed for any specific provision to be made. But a considerable number of pluri- or multilateral treaties and conventions contain a provision for the reference of disputes concerning their interpretation or application to some tribunal. If this happens to be the Court, as it often is, there is no difficulty: Article 63 of the Statute will automatically apply. But even where (as also often occurs) the reference is to be to an arbitral tribunal or commission, it is no less the case that, although the dispute only arises between two of the parties to the treaty, the outcome may affect other parties, even though not directly binding on them; and it is therefore arguable in much the same way as with reference to the indication of interim measures, that such tribunals ought to be regarded as possessed of an inherent jurisdiction to permit interventions by such other parties, although it would not be

¹ It is not certain it would be granted, as the question what is 'an interest of a legal nature' which might be 'affected by the decision in the case', could be a difficult one to answer. It is considered in paragraph (2) (a) below. It might be suggested that a non-party to a treaty can *ex-hypothesi* never have an interest of a *legal* nature in its interpretation, since it has no actual rights or obligations under the treaty. But this would seem to be too restrictive. Some light on the Court's possible attitude to the point may be shed by the answer it gave in the *Reservations* case to Question III in the request for an advisory opinion. But there is room for some doubt whether the views there expressed recognize sufficiently the legal interest a *potential* signatory may have in a treaty, even though it has not yet signed it—see as to this the article in this *Year Book*, 33 (1957), pp. 291-3.

² It is no doubt for this reason that amongst the reservations to the United States Optional Clause declaration, there figures one to the effect that the jurisdiction is not accepted in respect of the interpretation of any multilateral treaty unless the other parties to the treaty are also parties to the proceedings.

possible to predicate for such parties any automatic right to intervene such as is conferred by Article 63 of the Statute.

(2) *Conditions of exercise of the jurisdiction in the case of the Court*

(a) *Under Article 62 of the Statute.* No case of this kind has arisen before the present Court,¹ nor, it would seem, before the former Permanent Court, although in one case Article 62 was pleaded (the intervention, however, actually took place under Article 63).² It is clear that difficulties may well arise in determining whether the requisite conditions are fulfilled, namely, (i) that the State concerned should have an interest of a legal nature in the matter, and (ii) that this interest should be capable of being affected by the decision in the case. As regards (ii), it might be argued at one extreme that, technically, since the decisions of the Court are only binding on the parties, and cannot directly deny rights to or impose obligations on other States, the legal interests of such States can never be affected by a decision of the Court. But such an interpretation would amount to cancelling out the Article altogether, as well as failing to take account of the great persuasive authority (as declarations or expositions of the law) which the decisions of the Court normally possess, with a resulting influence, at least *de facto*, on the legal interests of all States. As regards (i), the phrase 'an interest of a legal nature' must be taken to be intended to exclude cases in which, although the interests of a State may be affected, these interests are of a purely political, economic or sociological nature, etc. But what is to be the criterion of a legal interest in this context? This is scarcely susceptible of any abstract answer. It would no doubt provide a clear-cut solution to the problem if it could be said that a legal interest capable of being affected by the decision will only exist where it appears that the legal rights or obligations of the State concerned *would* be affected if it were an actual party to the dispute. But this must probably be pronounced too narrow, for it is possible that a State may have a legal interest that would be affected, even though (because of the circumstances) its direct legal rights and obligations would not be. On the other hand, it would clearly be depriving Article 62 of all limiting elements if resort were had to the other extreme, and if an interest of a legal nature could be postulated simply on the basis that all States have an interest in the law, and in the condition of the law; for in that case, since *ex hypothesi* the Court can only give decisions on legal matters, and all such decisions influence the law³—there could never be a

¹ There is consequently no judicial guidance to its interpretation as such. It so happens, however, that the conditions which the Court laid down in the *Haya de la Torre* case as being applicable to the case of Article 63 (see subparagraph (b) below) must apply indifferently to both Articles.

² See *The Wimbledon, P.C.I.J.*, Series A, No. 1, p. 11.

³ This is just as true, for instance, of the interpretation of a bilateral treaty as it is of the general multilateral convention specially catered for by Article 63.

case in which a third State (whatever its identity) would not possess a potential legal interest in the result. From these considerations it might be possible to deduce theoretically how Article 62 should be applied, but to apply it in practice may well involve difficulties, and also considerations of propriety, for except perhaps where there were multiple interventions—which would be rare—an intervention would be liable to bring a reinforcement, perhaps a powerful reinforcement, to one side or other in the case. Consequently, while the Court would normally accede to any request which could reasonably be regarded as falling within the terms of Article 62, it would probably wish to avoid any interpretation admitting of interventions based on interests which, even if technically satisfying the requisite conditions, were of a remote or hypothetical character. Within these limits, however, there is room for considerable freedom of appreciation; and since intervention under Article 62 is not as of right, it must follow that the Court exercises a quasi-discretionary power under it, and is not absolutely bound to grant the request, even if the necessary conditions are present, or there would be no effective difference in this respect between this case and that of Article 63. Consequently, the Court is entitled to take into account the question of propriety, appropriateness, weight of interest, etc.

(b) *Under Article 63 of the Statute.* Although intervention under this Article is as of right, provided the conditions stated in it are fulfilled, it is naturally for the Court to decide whether they are actually satisfied or not, and this is specifically provided for by Article 66, paragraph 2, of the Rules of Court. Thus, it will be for the Court to say whether the construction of a convention is involved, whether the convention is of the kind specified, whether the intervening State is a party to it, and so on. Given that these conditions are present, the Court is bound to admit the intervention, and has no discretionary power in the matter, as it would seem it must have under Article 62 (see preceding paragraph). However, in the third and last phase of the *Asylum* case (*Colombia v. Peru*)—a phase officially styled the *Haya de la Torre* case—the Court, in dealing with an application under Article 63, indicated what might at first sight appear to be additional conditions not mentioned in Article 63. But these ‘conditions’, though laid down in respect of an Article 63 intervention, are not in their nature peculiar to that case, and would apply equally to an intervention under Article 62. The point they really go to, is not whether the intervention satisfies the actual conditions specified in these Articles, but whether it is a true intervention at all. The Court in effect specified certain *a priori* requirements which must be met before the acts in question could even rank for consideration as interventions under these Articles. They were as follows:

(i) *The intervention must take place in the course of the proceedings actually in progress before the Court.* It is obvious that no State can ‘intervene’ in a

case, proceedings in which have not yet been commenced before the Court, or which have been concluded because the Court has delivered its final judgment in the case. In the *Haya de la Torre* case, Cuba presented an intervention under Article 63, in her capacity as a party to the 1928 Havana Convention on Asylum. But although this intervention was duly effected during the course of the *Haya de la Torre* proceedings, a large part of it appeared to have reference to points considered and decided by the Court in the main *Asylum* case, the proceedings in which had been finally and definitively closed.¹ Peru (one of the parties) objected to the intervention² on the ground that, for this reason, it was out of time, and that, to use the language of the Court (*I.C.J.*, 1951, 76), '... it did not constitute an intervention in the true meaning of the term, but an attempt by a third State to appeal³ against the Judgment delivered by the Court on November 20th, 1950 [i.e. in the main *Asylum* case]'. The Court continued (*ibid.*, 77):

'On that point, the Court observes that the Memorandum attached to the Declaration of Intervention of the Government of Cuba is devoted almost entirely to a discussion of the questions which the Judgment of November 20th, 1950, had already decided with the authority of *res judicata*, and . . . to that extent it does satisfy the conditions of a genuine intervention.'

(ii) *The intervention must be adequately related to the subject-matter of the current proceedings.* The point here involved is closely connected with the previous one, but it is a distinct point inasmuch as it could happen that an intervention would not (as in the *Haya de la Torre* case) fall to be rejected as relating to proceedings already closed, but yet might not be adequately related to the subject-matter of the actual proceedings. On this, the Court said (*ibid.*, 76):

'... every intervention is incidental to the proceedings in a case: it follows that a declaration filed as an intervention only acquires that character in law, if it actually relates to the subject matter of the pending proceedings.'

The Court then pointed out that the proceedings in the current (*Haya*) case involved quite a different point from that in issue in the main *Asylum* case. In the Judgment in the latter case, it had been found that the Colombian Embassy in Peru was not entitled to give asylum to Señor Haya de la Torre. In the current case, the disputed point was whether, as Peru claimed,

¹ The *Haya de la Torre* case was considered by the Court to rank formally as a new dispute, and not simply as part, or a further development, of a previous one. The jurisdictional and other consequences of this are noticed elsewhere—see § 1 (III) (2) (d) (ii) above, and section (IV) below.

² This is an indication that objection to a third-party intervention under Article 63 (and presumably under Article 62 also) may be taken by the parties to the dispute and not merely by the Court.

³ Peru, as the party in whose favour the Court gave judgment in the main *Asylum* case, would have an interest in objecting to any attempt to reopen the matter.

Colombia ought to give effect to this Judgment by the particular method of causing its Embassy in Lima actually to surrender Señor Haya de la Torre directly into the hands of the Peruvian authorities.¹ Therefore, the only relevant question was whether the Cuban intervention did or did not relate to this latter question. Having found, as described in (i) above, that for the most part it did not, and to that extent could not rank as an intervention in the extant case, the Court went on to say that at the oral hearing the Cuban Agent had satisfied it that at least part of the Cuban memorandum of intervention was relevant to the particular issue thus before the Court, and it concluded (*ibid.*, 77):

‘Reduced in this way, and operating within these limits,² the intervention of the Government of Cuba conformed to the conditions of Article 63 of the Statute, and the Court, having deliberated on the matter, decided . . . to admit the intervention in pursuance of paragraph 2 of Article 66 of the Rules of Court.’

(IV) LIMITS OF THE JUDICIAL FUNCTION, AND THE JURISDICTION TO DECIDE *EX AEQUO ET BONO*

(1) *Limits of the judicial function*

The substantive and treaty aspects of the *Haya de la Torre* case were fully discussed in earlier articles in this series,³ and only the jurisdictional aspects will be considered here. The matter falls conveniently under the following heads:

(a) *Except by way of an interpretation of an existing judgment, the Court has no inherent or incidental jurisdiction to indicate how its judgments are to be carried out.* On this matter reference may be made to what was said in Section (III) (2) (b) above, on the principle of consent in connexion with the *Haya de la Torre* case. The Court found in effect that a request made by one of the parties did not constitute a request to the Court to interpret its Judgment in the previous main *Asylum* case (which the Court would automatically have inherent jurisdiction to do under Article 60 of the Statute). It was, rather, a request to the Court to indicate how that Judgment should be carried out or whether a particular method of carrying it out should (or *per contra* need not) be adopted. Such a request created in principle a *new* issue, which could not be regarded as part of, or directly consequential upon, the former proceedings; so that in order that the

¹ There were other possible methods of ‘terminating the asylum’, which was all that the Court’s Judgment in the main phase of the case required—e.g. by simply expelling the refugee from the premises, or causing him to be conveyed elsewhere.

² It is understood that the non-admissible parts of the original Cuban memorandum are not included in the Court’s printed volume of the pleadings in that case—see *Rosenne, op. cit.*, p. 334, n. 4.

³ See this *Year Book*, 32 (1955-6), pp. 77-78, and 33 (1957), pp. 235-6; for a further aspect see section (III) above.

Court might deal with it, its jurisdiction to do so must be separately established. This meant, *prima facie*, that an independent consent given by the parties to the Court so acting must be shown to exist—and this is what the Court found as having been given in the *Haya de la Torre* case;¹ but it would seem that the same purpose would be served if it could be shown that the original consents given by the parties (or any relevant instrument such as an Optional Clause declaration) also covered the later developments. In the *Haya de la Torre* case, one of the Colombian submissions asked the Court to find that Colombia was not bound 'in execution of the . . . Judgment of November 20th 1950' to surrender Señor Haya de la Torre direct into the hands of the Peruvian authorities. The Court declined to consider this submission for the following reasons (*I.C.J.*, 1951, 79):

'As was stated both in that Judgment² and in the Judgment of November 27th, 1950,³ the Government of Peru had not demanded the surrender of the refugee. This question was not submitted to the Court and consequently was not decided by it. It is not therefore possible to deduce from the Judgment of November 20th any conclusion as to the existence or non-existence of an obligation to surrender the refugee. In these circumstances, the Court is not in a position to state, merely on the basis of the Judgment of November 20th, whether Colombia is or is not bound to surrender the refugee to the Peruvian authorities.

'For these reasons, the Court cannot give effect to the above-mentioned Submissions.'

What the Court seems to have been saying here, in effect, was that what it was really being asked to do was to interpret its previous Judgment, but that as this Judgment did not cover the point now raised, the Court could not deal with the matter as one of the interpretation of a Judgment, and therefore it could not derive competence on the basis of, or as consequential upon, that Judgment.⁴ Colombia, however, had an alternative submission which asked the Court to decide the same point 'in the exercise of its ordinary competence', and the Court accepted this submission as one it could pronounce upon, and it proceeded to do so. It is from this that it can be deduced that the Court required some other basis of jurisdiction than one which would be merely incidental to its jurisdiction in the previous proceedings, and which it found in the *ad hoc* consent given by both parties in relation to the current proceedings.⁵

(b) *The Court cannot, on a judicial basis, indicate how a judgment should be carried out, or in which of various possible ways it should be executed.* Following upon what has just been considered under (a) above, the Court did find

¹ See passage quoted in § 1 (III) (2) (d) (ii) above.

² This was the Judgment in the main phase of the *Asylum* case (Merits).

³ i.e. in the second phase—interpretation of the Judgment in the main phase.

⁴ This at least seems to be the effect, though it is somewhat obliquely stated.

⁵ See § 1 (III) (2) (d) (ii) above.

that the adoption of one particular possible method of carrying out the Judgment in the *Asylum* case was *not* incumbent on the party against which that Judgment was given; but a careful reading of the decision makes it clear that this was in no way intended as an indication, even negative, of how the Judgment should in fact be carried out. It was really a consequence of the Court's view that all it could properly concern itself with, or lay down, was that the parties were obliged to carry out the Judgment by one means or another, but that it did not lie with the Court to indicate which, or make a selection out of the various possible alternatives. This was for the parties. Thus the Court would (in the particular circumstances of the case) have given the same negative answer to *any* question asking whether a particular method was obligatory,¹ and consequently no significance was really to be attached to the fact that one particular method was pronounced to be non-obligatory. All this was made quite clear by the passage in which the Court said (*I.C.J.*, 1951, 82) that its previous decision entailed

'... a legal consequence, namely that of putting to an end an illegal situation; the Government of Colombia which had granted the asylum irregularly is bound to terminate it.'

The Court went on (*ibid.*) to say that as the asylum was in fact still being maintained, the Government of Peru was 'legally entitled to claim that it should cease', but that the additional claim made by that Government that the asylum should cease in a particular manner could not be accepted. The Court concluded by saying that there was

'... no contradiction between these two findings, since surrender is not the only way of terminating asylum.'²

This particular line depended of course on the existence of more than one process by which the Judgment could be executed, any of which would suffice to satisfy its basic requirement that the asylum should cease. Had it been implicit in the character of the Judgment that it could only be satisfied in one way, the Court, although perhaps not theoretically bound to do so, would probably have indicated it. But in that case, it is unlikely that the parties would have found it necessary to have recourse to the Court at all in order to elucidate the point. Alternatively, if there had been any obscurity, it would probably have been a matter of interpreting the Judgment itself, and therefore part of the inherent incidental jurisdiction of the Court under Article 60 of the Statute. Side by side with the pronouncements noticed above, the Court explained why, although it could and would indicate that

¹ The view expressed was, however, motivated not automatic, since it might have been the case that the Judgment could only be satisfied in one particular way. As to why the Court did not think there was any obligation to *surrender* the refugee, see this *Year Book*, 32 (1955-6), pp. 77-78. The prominence of the 'surrender' issue was due to the fact that this was the method of execution Peru would have liked, but which Colombia did not want to employ.

² See n. 1, p. 129, above; n. 1 on p. 78 of the article in this *Year Book*, 32 (1955-6).

a particular method was not obligatory, it was not prepared (no *one* method being obligatory) to select for the parties which of various possible alternative methods they should—or rather had best—adopt; for clearly, such a question must turn on considerations of policy or expediency. The Court, in a passage in which it clearly indicated its view as to the limits of its judicial function in this context, stated (*I.C.J.*, 1951, 79) that its previous Judgment in the *Asylum* case

‘... did not give any directions to the Parties, and entails for them only the obligation of compliance therewith. The interrogative form in which they have formulated their Submissions shows that they desire that the Court should make a choice amongst the various courses by which the asylum may be terminated. But these courses are conditioned by facts and by possibilities which, to a very large extent, the Parties are alone in a position to appreciate. A choice amongst them could not be based on legal considerations, but only on considerations of practicability or of political expediency; it is not part of the Court’s judicial function to make such a choice.’

In conclusion, in the final paragraph of its Judgment in the *Haya de la Torre* case, the Court said (*ibid.*, 83):

‘Having thus defined in accordance with the Havana Convention the legal relations between the Parties with regard to the matters referred to it, the Court has completed its task. It is unable to give any practical advice as to the various courses which might be followed with a view to terminating the asylum, since, by doing so, it would depart from its judicial function. But it can be assumed that the Parties, now that their mutual legal relations have been made clear, will be able to find a practical and satisfactory solution by seeking guidance from those considerations of courtesy and good-neighbourliness which, in matters of asylum, have always held a prominent place in the relations between the Latin-American republics.’

(2) *Transcending the judicial function—action ex aequo et bono—judicial recommendations and extra-legal dicta*

(a) *The power to decide ex aequo et bono. Can the Court proprio motu suggest to the parties the desirability of investing it with the necessary power to give a decision on this basis?* It will be seen from the passages quoted at the end of the previous subsection that the Court declined to carry out a certain function because it could not do so on a purely judicial basis, but that it added an extra-legal expression of opinion which, while making no suggestions of substance, amounted to an implied recommendation to the parties to settle the matter by negotiation in a spirit of good faith and good will. This naturally did not amount to action *ex aequo et bono*, either *in se* or in intention, for this is a function which the Court can (under Article 38, paragraph 2, of the Statute) only exercise with the express consent of the parties. The rather peculiar wording of that Article however, in which it is stated that the provisions of the Statute concerning the Court’s judicial function ‘shall not prejudice the power of the Court to decide a case *ex*

aequo et bono, if the parties agree thereto', can be read as implying a power in the Court to raise the matter *proprio motu* and to suggest to the parties the desirability of investing the Court with the necessary powers; and this view is borne out by some observations of one of the dissenting Judges (Judge Azevedo) in the main phase of the *Asylum* case, in which he in effect drew attention to the fact that the character of certain cases may make a satisfactory settlement of them on a purely legal basis very difficult. He said (*I.C.J.*, 1950, 357):

'... the two Parties, whilst having urgently appealed to the Court to resolve the dispute, have not furnished it with the means to arrive at an independent solution as would have been possible under Article 38, paragraph 2, of the Statute (judgment *ex aequo et bono*). On the contrary, the parties have limited the action of the Court by indicating only the legal data applicable to the case.'

(b) *Judicial recommendations, suggestions and vœux*. The present Court has never been called upon to act under Article 38, paragraph 2, of the Statute, and there does not appear to be any case in which the Permanent Court did so, although the matter was much discussed (inconclusively) in the *Free Zones* case.¹ The *Haya de la Torre* case² is not, however, the only one in which the Court has in effect made recommendations or suggestions to the parties. The interim measures indicated by the Court in the *Anglo-Iranian Oil* case have already been noticed,³ and although the status of an indication of interim measures must always be much higher than that of a mere recommendation or suggestion, the case may properly be noticed here because it is the fact that the Court went outside the measures proposed by the United Kingdom which would have been purely conservatory of the *status quo* and it indicated an entirely novel course, which envisaged the setting up of a provisional joint régime to run the industry, and which, in other circumstances, might have led to a permanent settlement on some such basis.

The Court adopted a somewhat similar course (though not by way of the indication of interim measures) in the *Morocco* case, with reference to a matter another aspect of which has been considered in an earlier article.⁴ Called upon to interpret Article 95 of the Act of Algéciras, which governed the method of valuation for customs purposes of goods imported into Morocco under the then protectorate régime, the Court—after an exhaustive examination of the respective arguments put forward by the parties; of the *travaux préparatoires* of the Act of Algéciras itself; and of the previous customs practice in Morocco—came to the conclusion that none of the

¹ For a full account of this, see Lauterpacht, *op. cit.* in n. 4, p. 10, above, at pp. 213 et seq.

² See subsection (1) (b) above.

³ See section (II) above.

⁴ See this *Year Book*, 33 (1957), pp. 216-18.

suggested systems were satisfactory, and that something different from any of them must be indicated. The Court said (*I.C.J.*, 1952, 211):

'In these circumstances, the Court is of the opinion that Article 95 lays down no strict rule on the point in dispute. It requires an interpretation which is more flexible than either of those which are respectively contended for by the Parties in this case.

'The Court is of the opinion that it is the duty of the Customs authorities in the French Zone, in fixing the valuation of imported goods for customs purposes, to have regard to the following factors:'. . .

The Court then proceeded to indicate nine separate factors which ought to be taken into account in fixing the valuation of imported goods for customs purposes, of which only four had been expressly mentioned in Article 95 of the Act of Algeciras, the remaining five being laid down by the Court, after considering the parties' argument and the previous customs practice in Morocco. The Court concluded with the following passage, by way of recommendation and suggestion (*ibid.*, 212):

'The factors referred to above are not arranged in order of priority but should operate freely, within any limits that have been, or may be, prescribed under Article 96 of the Act; and, in view of the governing principle of economic equality, the same methods must be applied without discrimination to all importations, regardless of the origin of the goods or the nationality of the importers. The power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith.'

A strong element of suggestion is also to be found in the line taken by the Court in the *Nottebohm* (Jurisdiction) case, in regard to the argument, advanced by Guatemala, to the effect that Guatemalan law precluded the Guatemalan Government from appearing before the Court in any case in which the Court lacked jurisdiction in respect of Guatemala. This plea was linked with Guatemala's main jurisdictional contention¹ that because Guatemala's declaration accepting the compulsory jurisdiction of the Court had lapsed, therefore the Court lacked jurisdiction to continue with the case. Although there was some uncertainty as to the exact character of the Guatemalan law thus cited, and possibly also as to whether Guatemala was really intending to suggest that this law would, by reason of the lapse of Guatemala's optional clause declaration, override any jurisdiction already acquired by the Court by reason of the institution of proceedings in the case prior to the date of such expiry, there is no doubt that the plea was taken by Liechtenstein as involving the contention that, in this respect, Guatemalan law did, or would if necessary, override the applicable international law rules, and that this was also the interpretation placed on the plea by one of the Judges (Judge Klaestad) who, in a separate

¹ See § 1 (I) (4) (a) and (b) above.

statement annexed to the Judgment of the Court, said *inter alia* (I.C.J., 1953, 125):

‘With regard to the allegations of the Government of Guatemala that provisions of its national law prevent that Government and its officials from appearing before the Court, it suffices to say that such national provisions cannot be invoked against the rules of international law.’¹

The Court preferred to take a different line and, without going into the point of principle raised by Liechtenstein and pronounced upon by Judge Klaestad, to avoid this particular issue by suggesting to Guatemala an interpretation of its own domestic law requirements that would enable it to accept the finding that the Court had jurisdiction in the case, without becoming involved in a situation of conflict with the provisions of Guatemalan law. In effect, the Court suggested (and indeed by implication clearly recommended that Guatemala should take the view) that the definite finding of the Court that it had jurisdiction met any difficulty arising from the Guatemalan law in question, by creating a situation in which that law would not apply, or in which its requirements would be satisfied. The relevant passage is as follows (*ibid.*, 123):

‘The Court does not consider that Liechtenstein in this connection has given a correct interpretation of the view of Guatemala on this point. In the opinion of the Court, the Government of Guatemala, on the premise that the Court lacked jurisdiction in an absolute manner, meant that, by reason of the Court’s lack of jurisdiction, the laws of Guatemala did not authorize that Government to be represented before a court which had no power to adjudicate. The Court does not consider it necessary to ascertain what the laws of Guatemala provide in this connection. It will confine itself to stating that, once its jurisdiction has been established by the present Judgment with binding force on the Parties, the difficulty, in which the Government of Guatemala considered that it had been placed, will be removed and there will be nothing to prevent that Government from being represented before the Court in accordance with the provisions of the Statute and Rules.’

The *Minquiers* case also affords some interesting instances of judicial suggestions or extra-legal expressions of opinion, not on the part of the Court as such, but of the two Judges (Judges Basdevant and Levi Carneiro) who delivered separate, though concurring, opinions. Judge Basdevant who, though agreeing with the decision of the Court, did so on rather different grounds, ended his masterly opinion with the following paragraph (I.C.J., 1953, 83-84):

‘Thus the United Kingdom has, in modern times and at the present day, held the disputed islets so that the hypothesis that the King of England formerly held them appears to be reasonable. At the same time the medieval division has been interpreted in practice in the sense of an attribution of the islets to the King of England. All this,

¹ See also in the same sense Judge Alvarez and Lord McNair in the *Norwegian Fisheries* case (I.C.J., 1951, 152 and 181), as cited in this *Year Book*, 30 (1953), pp. 26-27.

however, was done not in absolute terms but in a somewhat flexible manner; the British authorities have acted with moderation, hesitating to exercise the full rights which the United Kingdom now claims, addressing themselves to the French authorities in preference to taking action against Frenchmen. In order to maintain what has been established by practice on the basis of ancient instruments and of a liberal interpretation, this flexibility should likewise be maintained. But the Court has not been asked either in the Special Agreement or in the written proceedings or in the course of the arguments to prescribe such a maintenance.¹

Judge Basdevant was here clearly suggesting to the United Kingdom Government that it should continue to deal with the affairs of the Minquiers and Ecréhos groups as heretofore, in so far as individual French interests (e.g. fishery) were concerned, i.e. on a basis of understandings reached with the French mainland authorities, rather than by administrative action on the spot.¹ The concluding remarks are also interesting as indicating the limits of the action by way of prescribing equitable courses that the Court can take, in the absence of express request or consent by the parties. As regards Judge Levi Carneiro's remarks, it is necessary to explain that in the course of the proceedings, the French Government had indicated the desire and intention, should the Court find in its favour on the question of sovereignty, to construct extensive hydro-electric works, based partly on the Minquiers group, and harnessing the force of the very strong tides in that region, which would be of great benefit as a source of electric power for the whole of France. It was obvious that the possibility of such a project, however interesting and potentially beneficial, could not, as a matter of law, have any effect at all on the title to the Minquiers group, which must depend on the existing or antecedent legal situation respecting sovereignty. The United Kingdom Government, however, recognizing the potential importance of the project, and desiring to make it clear that a finding in favour of the United Kingdom would not prevent the realization of something so greatly in French interests, if otherwise capable of being achieved, made a statement through its Counsel indicating its complete readiness, irrespective of the outcome of the case, to co-operate with the French authorities for the purpose. In view of this, Judge Levi Carneiro concluded his separate, concurring, opinion with the following remarks (*ibid.*, 109):

'The possibility of English co-operation in carrying out the French Government's project for the production of electrical energy by means of works in the Minquiers region, in accordance with the declaration made by the British representative with the authorization of his Government (Oral Arguments). I am willing to believe that no

¹ The groups lie in the Bay of Cancale formed by the west coast of the Cotentin peninsula (Normandy) and the north coast of Brittany, and are situated between the respective French coasts and the island of Jersey in the Channel Islands group. Though nearer to Jersey, they are also near to France, and have long constituted French as well as Jersey fishing grounds. The fisheries aspect was and is regulated by an Agreement of 30 January 1951.

judge nowadays can blindly follow the obsolete rule *fiat justitia, pereat mundus* (Ripert, *La règle morale dans les Obligations civiles, passim*). Still less can we be bound by such a rule in the field of international law whose principles, as it has been said, may represent the consecration of the former natural law. And I would have been pleased to place on record the generous declarations of the representative of the British Government.'

A better translation of the original French of the last sentence, in the context would have been 'And I should be pleased, &c.'¹ This sentence was obviously, if obliquely, intended as a recommendation to the United Kingdom Government to implement its declaration should the occasion arise, or as an implied expression of hope that it would do so.

(V) JURISDICTION OF THE INTERNATIONAL COURT DERIVING FROM ARTICLE 37 OF THE STATUTE

Article 37 of the Statute,² on the face of it apparently a very simple clause, in effect provides (*inter alia*) that, *as between parties to the Statute*, the International Court shall be substituted for the former Permanent Court as the competent tribunal to act under any 'treaty or convention in force', by the terms of which the parties were obliged to have recourse to the Permanent Court for the settlement of any dispute arising under the treaty or convention in question. In actual fact, this provision is capable, potentially, of raising a considerable number of difficulties, an interesting discussion of which is given by Rosenne.³ It is obvious that in the case of multi-lateral treaties and conventions, the term 'in force' must mean that not only is the treaty itself in force, but also that it is in force for the parties to the dispute—i.e. that they have not withdrawn from their participation in the treaty, as is frequently possible for the individual parties under multi-lateral treaties. As regards the date on which the treaty or convention concerned must be 'in force', there can be little doubt that this is the date on which the dispute is referred to the Court—or perhaps more accurately the date as at which the Court is required to determine whether it was (on that date) effectively 'seised' of the dispute or not.⁴ Equally, it is clear that Article 37 does not substitute the Court *generally* for the Permanent Court, wherever the latter is mentioned in an existing treaty or convention, but only in relation to 'the parties to the present Statute'. In the *South-West Africa* case, the Court had regarded Article 37 as being applicable to

¹ The French was 'Et je me plairais'. Had Judge Levi Carneiro intended to say 'And I would have been pleased' he would have said 'Et je me serais plu'.

² Article 37 states that 'Whenever a treaty or contention in force provides for a reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.'

³ Op. cit. in n. 2, p. 8, above, at pp. 280-2.

⁴ As to this see § 1 (I) (4) above, *passim*; and also § 1 (I) (4) (c) on the question of treaties being 'in force' for this purpose.

the case of the League of Nations Mandate for South-West Africa, Article 7 of which provided for a reference to the Permanent Court of any dispute between the Mandatory Power and a Member of the League, concerning the interpretation or application of the Mandate. The Court said (*I.C.J.*, 1950, 138) that 'Having regard to Article 37 of the Statute of the . . . Court, and Article 80, paragraph 1, of the Charter,¹ the Court is of opinion that this clause in the Mandate is still in force and that therefore the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions.' Although, in this passage, the Court only referred to Article 7 of the Mandate as being in force, and not to the Mandate as a *whole* as constituting the relevant 'treaty or convention in force', there can be no doubt (from the rest of the Court's opinion in that case) that it did so regard the Mandate as a whole.² During the period now under review, the Court had further occasion to apply Article 37, namely, in the first phase of the *Ambatielos* case, when it said (*I.C.J.*, 1952, 39):

'The Hellenic Government relies, in the present case, on Article 29 of the Treaty of 1926, read in the light of Article 37 of the Statute of the Court which in effect provides all references in treaties to the Permanent Court of International Justice must now be construed as references to the International Court of Justice.'³

If, for reasons already given, the reference in this passage to 'all' treaties is not quite correct,⁴ these observations nevertheless state the point very succinctly.

§ 3. THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT

In the case of *Reservations to the Genocide Convention* (the substantive aspects of which have been considered in an earlier article⁵), the Court, before answering the questions put to it by the United Nations Assembly, devoted the opening part of its advisory opinion to considering and answering certain objections that had been advanced to its complying with the request for an opinion,⁶ and thereby carried a stage farther the already very

¹ This provided that except as otherwise agreed in individual trusteeship agreements, nothing in the trusteeship Chapter of the Charter was to be 'construed in or of itself to alter in any manner the rights . . . of any States or . . . peoples or the terms of existing international instruments . . . ' (including, therefore, existing Mandates).

² See as to this, the article in this *Year Book*, 29 (1952), pp. 8-10.

³ See also the present writer's article in this *Year Book*, 33 (1957), pp. 255-66.

⁴ Article 37 would not apply to a treaty between non-parties to the present Statute, or in respect of a particular party to the treaty not in that position. But there are, of course, now few such.

⁵ See this *Year Book*, 33 (1957), pp. 272-93.

⁶ Rosenne (op. cit. in n. 2, p. 8, above, at p. 460 and n. 1 on p. 463) appears to suggest that it would be preferable if the Court (as it usually does in the case of contentious proceedings) were to deal as a separate issue with objections to its exercising its advisory jurisdiction, instead of considering such matters concurrently with the substance of the actual request. In practice

thorough consideration given by the Court to the nature of its advisory jurisdiction, in the (First) *Admissions* and (Second) *Admissions* cases, and in the first phase of the *Peace Treaties* case. This was discussed in an earlier article in this series.¹ The main points touched upon in the *Reservations* case are considered below.

(i) *A request for an advisory opinion should not, in principle, be refused.* In its advisory opinion, in the first phase of the *Peace Treaties* case, the Court had made it clear that the exercise of the power to give advisory opinions, conferred upon it by Article 65 of the Statute, was discretionary. The Court was not obliged to give an opinion, and could decline to do so, even where it would unquestionably have the right to comply with the request for an opinion. The Court, in short, had a power of appreciation which it would exercise in the light of the circumstances of each case. In a previous article in this series, an attempt was made, on the basis of certain indications of the Court's views in the previous cases above mentioned, to assess some of the principal grounds on which the Court might be expected to decline to give an opinion.² They centre chiefly round the two questions (a) whether the request relates to matters of a legal character, on which the Court can give an opinion on a judicial basis, and without exceeding the scope of its judicial function; and (b) whether the request comes appropriately from the organ or organization making it, that is to say, whether it relates to matters falling properly within the field of that organ or organization, an opinion on which can reasonably be regarded as necessary, or at any rate as required, for the functional or administrative purposes of the organ or organization concerned—in short, whether the organ or organization has a legitimate interest in seeking an opinion on the matter from the Court. In the *Reservations* case, the Court reaffirmed this general position. It referred again to the permissive character of Article 65 which recognized (*I.C.J.*, 1951, 19):

‘the Court has the power to decide whether the circumstances of a particular case are such as to lead the Court to decline to reply to the request for an Opinion.’

Nevertheless,

‘A reply to a request for an Opinion should not, in principle, be refused.’

The Court went on to say:

‘It is . . . beyond dispute that the General Assembly, which drafted and adopted the Genocide Convention, and the Secretary-General, who is the depositary of the instru-

however, since the Court usually has to render the opinion before the date of the next regular annual session of the United Nations Assembly, or other organ or organization concerned, there would usually be insufficient time in which to hold the two separate sets of proceedings that this would entail in all those cases where the Court decided that it ought to give the advisory opinion. Nor, if it gives the opinion, can the Court very well avoid also dealing with the objections raised to its doing so.

¹ See this *Year Book*, 29 (1952), pp. 45-55.

² See *ibid.*, paragraph (e) on p. 53.

ments of ratification and accession, have an interest in knowing the legal effects of reservations to that Convention and more particularly the legal effects of objections to such reservations.¹

The reference in this passage to reservations and objections thereto leads up to the next point to be considered.

(ii) *The fact that the matters to which the request for an opinion relates are in dispute between two or more States is not in itself a ground for refusing to comply with the request.* On the ground that the reservations purported to be made to the Genocide Convention by certain States had met with objection by other States, and with a denial of their validity or effect, it was suggested that the request related to a 'dispute' between States, and the Court was invited, on the precedent of the *Eastern Carelia* case before the Permanent Court,¹ to decline to give an opinion, just as it had been so invited, on similar grounds, in the *Peace Treaties* case.² In the *Eastern Carelia* case, the Permanent Court refused to comply with the request of the Council of the League for an opinion on the ground that the 'opinion which the Court has been requested to give bears on an actual dispute between Finland and Russia'.³ In the earlier article already referred to, this matter was fully discussed, and the grounds on which the Court distinguished the *Peace Treaties* case from the *Eastern Carelia* case were stated.⁴ Sir Hersch Lauterpacht has, however, questioned whether, considered purely as an attempt to distinguish the *Peace Treaties* case from the *Eastern Carelia* case, the grounds mentioned by the Court really make the distinction, and he suggests that what the Court said in the *Peace Treaties* case amounted more nearly to a complete (though unavowed) abandonment of the whole principle of the *Eastern Carelia* case, in which the Permanent Court declined to give an opinion because 'the question put to it was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties'.⁵ However that may be, the Court in the *Reservations* case, as in the *Peace Treaties* case, did not accede to the view that the mere existence of a dispute⁶ between individual States about the matter ought to lead it to refuse the request for an opinion, and stated that it could 'confine itself to recalling the principles laid down

¹ Series B, No. 5.

² *I.C.J.*, 1950, 65.

³ *This Year Book*, 29 (1952), pp. 50-52.

⁴ *Per the Court in the Peace Treaties case, I.C.J.*, 1950, 72.

⁵ *Loc. cit.* at p. 27.

⁶ Actually, it is far from clear that, in the *Reservations* case, there was technically any 'dispute' between States, at any rate for the time being. Certain reservations had been objected to, and the objecting States might be expected to take the line that unless the reservations were withdrawn, they could not recognize the reserving States as parties to the Genocide Convention. In any case they would maintain that they had no obligations towards the reserving State in respect of the Article reserved on. But there was no immediate 'dispute'.

in its Opinion of March 30th, 1950 [the *Peace Treaties* case].¹ A principal reason for this attitude was the legitimate interest possessed by the United Nations General Assembly in the matter, as stated in the last of the passages quoted in paragraph (i) above; and it is becoming increasingly clear that only in very special circumstances (e.g. if the request were to relate to a non-legal matter or was not susceptible of a legal answer) would the Court be likely to decline to give an opinion on any question falling squarely within the function of the requesting organ or organization, and in which it had a legitimate interest in obtaining an answer—irrespective of other factors. Although it was set out in the earlier article referred to,² it is worth recapitulating the main passage in the *Peace Treaties* case in which this view was stated (*I.C.J.*, 1950, 71):

‘The consent of States, parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court’s reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court’s Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an ‘organ of the United Nations’, represents its participation in the activities of the Organization, and, in principle, should not be refused.’

This passage may be taken as conclusive of the Court’s attitude on this matter; but the following further points may be noted, and first, two incidental elements which have assisted in promoting this point of view:

a. As mentioned at the end of the passage just quoted, the Court (unlike the Permanent Court, which was never a part of, though closely related to, the League of Nations) is actually one of the main organs of the United Nations, its Statute being an integral part of the Charter, and all the Members of the United Nations being automatically parties to the Court’s Statute.³ To that Organization, at any rate, it owes a definite duty as the judicial organ charged with carrying out or assisting in carrying out certain functions. This does not of course override the permissive character of Article 65 of the Court’s own Statute. But it does mean that the Court must pay special regard to the institutional aspects of the matter, before declining to comply.

b. As in the *Peace Treaties* case,⁴ the Court, in the *Reservations* case (*I.C.J.*, 1951, 19), again referred to Article 68 of the Statute, which allows the Court to apply contentious procedure to the consideration and hearing of requests for advisory opinions as if a dispute were involved. It

¹ See this *Year Book*, 29 (1952), pp. 52-53.

³ See Articles 92 and 93 of the Charter.

² See as to these, *ibid.*

⁴ See *I.C.J.*, 1950, 72.

would seem, from the context of the reference to Article 68 in the *Reservations* case, that the Court regards the existence of this faculty as assisting the exercise of its discretion in the sense of complying with a request for an advisory opinion, even though the request relates to a matter in dispute between individual States.

c. *Dangers of the exercise of advisory jurisdiction in respect of what are fundamentally contentious disputes between States.* It is clear that the Court cannot lightly refuse to give an opinion genuinely required by an international organ or organization for its own purposes. Yet the objections to doing so where a direct dispute between States is involved are considerable, and it is to be hoped that, even if the occasions for applying the *Eastern Carelia* principle may be few, that principle will not, as such, be abandoned, if only for the influence it may exert in preventing requests being addressed to the Court in cases that involve an obvious attempt to circumvent the limits of its jurisdiction in contentious cases. An organization such as the United Nations has a scope so wide that almost any matter can plausibly be brought within it. Other organizations empowered to seek advisory opinions from the Court¹ cover further very wide fields. The possibility that the Court's advisory jurisdiction might be used indirectly to implead States which have not consented to the Court's compulsory jurisdiction, and which could not be brought before it in contentious proceedings, cannot therefore be excluded—in short, as the minority Judges in the *Peace Treaties* case feared might prove to be the case (in the absence of the *Eastern Carelia* principle), a general compulsory jurisdiction could be introduced by the back door.² There would also be the danger that the advisory jurisdiction might be used as a means of circumventing specific reservations which a State accepting the compulsory jurisdiction of the Court had deliberately attached to that acceptance. In such a case, something very like an abuse of the process of the Court would be involved; while in all these cases the use of the contentious procedure under Article 68 could only be a palliative (but might well prove equally an aggravation) from the point of view of the State which regards itself as impleaded without its consent. Again, unless the advisory opinions of the Court are to be denied the great persuasive influence and authority they obviously possess, the fact that advisory opinions are not technically binding on the parties, may mitigate, but in no sense disposes of the difficulty. Nor, finally, despite the great weight of Sir Hersch Lauterpacht's views on this point,³ is it really satisfactory to cut the gordian knot by pointing to the fact that, so far as the

¹ See above, n. 3, p. 36; and for a complete list of the organs and organizations, numbering nearly twenty, now empowered to seek advisory opinions of the Court, see Rosenne, *op. cit.* in n. 2, p. 8, above, at pp. 450-2.

² For a summary of the minority arguments, see this *Year Book*, 29 (1952), n. 3 to p. 51.

³ See *op. cit.* in n. 4, p. 10, above, at p. 358.

member States of the United Nations are concerned, they have after all conferred upon the Court its advisory jurisdiction, and must abide by the consequences—for by reason of Article 65 of the Statute itself, they only conferred on it a permissive jurisdiction, and the point is precisely how ought the Court's discretion, thus conferred, to be exercised. Consequently, there exists a genuine dilemma, and, as Sir Hersch Lauterpacht has said in another connexion,¹ 'the conflict between these two sets of considerations is real and cannot be solved or attenuated by a legal formula. The solution must depend on the strength of these considerations as determined by the circumstances of each case.' It is reasonable to suppose, however, that the Court will always look to the real, as opposed to the ostensible reason for the request, and will hesitate to comply in cases where, even if some connexion with the work and objects of the requesting body is not entirely wanting, the real purpose is to obtain a judicial pronouncement in a case which is essentially a contentious case, but which could not be brought before the Court in contentious proceedings.

(iii) *The Court is not debarred, in the exercise of its advisory jurisdiction, from interpreting a treaty at the request of interests other than or transcending those of the actual parties to the treaty.* An objection of the kind implied by the heading to this paragraph, fundamentally similar to that noticed above in relation to the propriety of the Court giving advisory opinions about matters the subject of a specific dispute between two or more States, was advanced in the *Reservations* case. Only the States parties to a given treaty or convention, it was said, were entitled to interpret or seek an interpretation of it. Consequently, to use the language of the Court (*I.C.J.*, 1951, 19), 'the request for an opinion would constitute an inadmissible interference by the General Assembly and by States hitherto strangers to the Convention, in the interpretation of that Convention . . .'. The Court might, in reply to this contention, have pointed out that what was involved in the request for an opinion was not so much the interpretation of any specific provision of the Genocide Convention, as the general question of the effect of unilateral reservations, and of objections thereto, on the right to become a party to the Convention. However, the Court preferred to reject the contention, as in the case of the previous objection, on the more fundamental ground of the undoubted and legitimate interest of the Assembly *as such* in the interpretation of the Convention, saying (*ibid.*, 19-20):

'It must be pointed out in this connection that, not only did the General Assembly take the initiative in respect of the Genocide Convention, draw up its terms and open it for signature and accession by States, but that express provisions of the Convention (Articles XI and XVI) associate the General Assembly with the life of the Convention; and finally, that the General Assembly actually associated itself with it by endeavouring

¹ See § 1 (III) (3) (c) above.

to secure the adoption of the Convention by as great a number of States as possible. In these circumstances, there can be no doubt that the precise determination of the conditions for participation in the Convention constitutes a permanent interest of direct concern to the United Nations which has not disappeared with the entry into force of the Convention.'

But having said this, the Court went on to refer to two further points of a more questionable character (*ibid.*, 20):

'Moreover, the power of the General Assembly to request an Advisory Opinion from the Court in no way impairs the inherent right of States parties to the Convention in the matter of its interpretation. This right is independent of the General Assembly's power and is exercisable in a parallel direction. Furthermore, States which are parties to the Convention enjoy the faculty of referring the matter to the Court in the manner provided in Article IX of the Convention.'

Neither of these arguments can be regarded as very convincing. Doubtless it was true that, theoretically, the inherent rights of the States parties to the Convention, in the matter of its interpretation, would not technically be impaired; but to deny that these would be affected, would be to deny the undoubted authority and influence of the Court's opinions. As for the second point, it seems to beg the objection so to speak, which was, precisely, that the parties to the Genocide Convention had not taken this step, and therefore it ought not to be taken for them by another entity employing a circumambient process. It follows that it would have been preferable if the Court had confined itself to the simple and uncontrovertible point that the Secretary-General of the United Nations needed the opinion in order to carry out his functions in relation to the Convention. For instance, as the depositary authority, it was his task *inter alia* to determine and notify member States of the date of the coming into force of the Convention, which depended on twenty valid ratifications or accessions being deposited. For this and other reasons, the Secretary-General had a definite need to know what would be the effect on the validity of a ratification or accession, of a formal objection taken to a unilateral reservation attached to it.¹

(iv) *The Court is not debarred, in the exercise of its advisory jurisdiction from interpreting a treaty merely because the treaty contains a clause making specific provision for the settlement of disputed points of interpretation.* The nature of this point was stated by the Court as follows (*ibid.*, 20):

'Another objection has been put forward to the exercise of the Court's advisory

¹ It is believed that, in the case of the Genocide Convention, by time the request for an advisory opinion was actually made, the necessary number of ratifications and accessions *not* subject to any reservation had in fact been obtained. But this did not affect the principle. Moreover, the general question whether a reserving State whose reservation had been objected to, can be treated as a party, could arise in other ways—supposing for instance that, through denunciations, the number of unconditional participations fell below that required for keeping the treaty in force—or for the purpose of determining the States to which, under the treaty, the Secretary-General had to make certain notifications and communications.

jurisdiction: it is based on Article IX of the Genocide Convention which provides that disputes relating to the interpretation, application or fulfilment of that Convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute. It has been contended that there exists no dispute in the present case and that, consequently, the effect of Article IX is to deprive the Court, not only of any contentious jurisdiction, but also of any power to give an Advisory Opinion.¹

The Court rejected this contention, giving two grounds for doing so. The first was stated as follows:

‘The existence of a procedure for the settlement of disputes, such as that provided by Article IX, does not in itself exclude the Court’s advisory jurisdiction, for Article 96 of the Charter confers upon the General Assembly and the Security Council in general terms the right to request this Court to give an Advisory Opinion “on any legal question”.’

It is submitted that this ground of rejection did not fully dispose of the matter, because it only went to the question of the right or power of the Court to give an advisory opinion, rather than to that of the *propriety* of its doing so in the circumstances, which was the real point of the objection. All issues of this kind arise, and have relevance, precisely because, although under Article 96 of the Charter the Assembly and the Security Council have the right to request an opinion from the Court on any legal question, the Court (by reason of Article 65 of the Statute) is not bound to comply with the request. It ‘may’ do so, and consequently has a discretion to refuse. This is equally the answer to the argument—in itself not without some persuasive force—that Members of the United Nations inserting provisions for the settlement of disputes in treaties and conventions, must be assumed to have done so in the knowledge, and against the background, of the fact that an advisory opinion on the self-same treaty or convention may be requested of the Court. This is true, but that background *includes equally Article 65 of the Statute*, and the Court’s discretion to decline. States have therefore in no way conferred upon the Court a species of standing authority automatically to comply with requests for advisory opinions, and the Court cannot escape the necessity for determining the point in each case on the merits.

The second ground of rejection was stated by the Court as follows (*ibid.*):

‘Further, Article IX, before it can be applied, presupposes the status of “contracting

¹ An underlying irony of this objection lay in the fact that the principal reservations to which objection had been taken were precisely to this Article IX, embodying an obligation to refer disputes about the Convention to the Court; and, moreover, that these reservations had been made precisely by the States now advancing the objection based on Article IX which, since they had made a reservation to it, they were no longer entitled to invoke or rely on. A further self-contradiction in the various objections resulted from the fact that whereas the objection referred to in this passage from the Court’s opinion maintained that no ‘dispute’ existed, another objection dealt with by the Court earlier (see paragraphs (i) and (ii) above) was based on the alleged existence of a dispute.

parties"; consequently, it cannot be invoked against a request for an Opinion the very object of which is to determine, in relation to reservations and objections thereto, the conditions in which a State can become a party.'

This point is essentially the same one that, as already indicated, the Court might have taken, but did not take, in relation to the question considered in paragraph (iii) above, namely, that the Court was not really being called upon to interpret any actual provision of the Convention but to advise on a question relating to the right or faculty of participation in the Convention. Admittedly this might in some cases have depended on a specific article of the treaty or convention concerned, but in the given case it did not, depending rather on a point of general treaty law.¹ The Court was therefore able to avoid, and did avoid, expressing a view on the real difficulty involved by this objection, which is a genuine one, and might be described as giving rise to the issue whether it is right that the advisory jurisdiction of the Court should be substituted for the treaty procedure intended by the parties, i.e. for the contentious jurisdiction and the means of recourse specifically provided for by them in the treaty. In the case of the Genocide Convention, the Court itself was the tribunal designated under the disputes Article, and this naturally simplified the matter. But suppose that the Convention, or any other international agreement of this kind, had indicated, instead of the Court, some other tribunal, e.g. a Commission of Arbitration, or the administrative tribunal of some international organization—would it then be desirable that the Court, by way of its advisory jurisdiction, should be substituted for the tribunal designated by the treaty or convention concerned, and proceed to carry out the latter's interpretative function? The point is not disposed of by the fact that the advisory opinion of the Court would not be binding, whereas the treaty tribunal's award or adjudication would. This would not alter the fact that the treaty tribunal might subsequently be called upon to determine the same, or a kindred point, and that it would then have to do so in the light of an opinion of the Court already given and, so far as the treaty tribunal was concerned, inevitably pre-judging the matter. Alternatively, supposing that, for this very reason, the matter never went to the treaty tribunal, the net effect would be that a point of interpretation arising on the treaty, which the parties might designedly have intended should go to a specially constituted tribunal (e.g. because technical matters were involved), would be dealt with in a manner, and by a tribunal, other than as intended by the parties. Even

¹ This perhaps needs qualification. Admittedly, a clause in the Convention might have governed the question of the right to make reservations; but in that case there would have been no need for this particular reference to the Court. Admittedly also, even in the absence of any specific clause, the question of the right to make reservations may be affected by the general character of the instrument concerned, its purposes, etc.; and this was certainly true in the case of the Genocide Convention.

where the Court itself was the designated treaty tribunal, it would remain the case that issues intended to be dealt with through the Court's contentious procedure and in a manner binding on the parties to the dispute, would be determined by other means (unless the Court applied Article 68 of the Statute),¹ and with different effect. However that may be, it is evident that where the Court is *not* the treaty tribunal, an issue of the propriety of the substitution of one tribunal for another is raised, very similar to that which came up in the *Ambatielos* case, and which has already been fully discussed.² It will be recollected with what emphasis the Court denied any intention of substituting itself for the designated treaty tribunal in that case, particularly for the purpose of dealing with any point touching on the merits; and how both the Court, and most of the Judges delivering otherwise dissenting opinions, stressed the undesirability of such a course. This is not to say that the Court may not be perfectly entitled to give an advisory opinion in such a case, and may not, for various reasons, find itself more or less compelled to do so. The difficulty is one which, like others in this field, cannot be solved by any general formula, and its solution must depend on the individual circumstances of each case.

(v) *Where a request for an advisory opinion relates to a particular question or treaty, the effect of the opinion, when given, is strictly confined to that question or treaty.* The applicability of this principle in any given case, no doubt depends to some extent on the actual terms of the relevant request. But it would apply in the absence of any indication of a contrary intention. In the *Reservations* case, its application was affirmatively indicated, and the Court said (*ibid.*, 20):

'The Court observes that the three questions which have been referred to it for an Opinion have certain common characteristics.

'All three questions are expressly limited by the terms of the Resolution of the General Assembly to the Convention on the Prevention and Punishment of the Crime of Genocide, and the same Resolution invites the International Law Commission to study the general question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law. The questions thus having a clearly defined object, the replies which the Court is called upon to give to them are necessarily and strictly limited to that Convention. The Court will seek these replies in the rules of law relating to the effect to be given to the intention of the parties to multilateral conventions.'

The final sentence of the foregoing passage indicates the real nature of the difficulty that arises in this sort of case, and also that the Court was fully conscious of a certain lack of realism in the endeavour to confine the scope of its opinion to the particular case of the Genocide Convention, and to

¹ Which enables the Court to deal with the case on the basis of its contentious procedure 'to the extent to which it recognizes [this] to be applicable'.

² See Division A, § 1 (II) (3) above, *passim*.

insulate it from any more general application. Where the request relates not so much to a particular point of the interpretation of an individual article, as to a general point of treaty law; or where, although involving a genuine point of interpretation arising on a particular treaty, it relates to a provision (such as a most-favoured-nation or non-discrimination clause) of a kind found in many treaties, it is inevitable that the effect and influence of the Court's advisory opinion will extend beyond the confines of the particular context in which it was given—a matter which, again, may well raise an issue of propriety in certain circumstances.¹

(vi) *In the exercise of its advisory jurisdiction, the Court may comply with requests for advice on purely abstract questions of law.* This matter, which had led to a good deal of discussion, both in the Assembly itself² and in the Court, was settled once and for all in the (First) *Admissions* case when, in reply to an objection based on the abstract character of the question involved, the Court said (*I.C.J.*, 1948, 61) that by reason of Article 96 of the Charter, and Article 65 of the Statute, 'the Court may give an advisory opinion on any legal question, abstract or otherwise'. In the *Reservations* case the Court (*I.C.J.*, 1951, 21) said:

'The three questions are purely abstract in character. They refer neither to the reservations which have, in fact, been made to the Convention by certain States, nor to the objections which have been made to such reservations by other States. They do not even refer to the reservations which may in future be made in respect of any particular article; nor do they refer to the objections to which these reservations might give rise.'

By way of comment on these observations, the following points may be noted:

a. There are ambiguities about the term 'abstract'. In one sense, the question in the *Reservations* case was *not* abstract, inasmuch as it related to a particular convention, the Genocide Convention and the effect of reservations to it. But it was abstract in the sense that it did not involve the Court in advising on the validity of any particular reservation.

b. As Rosenne very pertinently points out,³ however abstract the actual question may be, the Court may be forced to deal with it in concrete terms in so far as (see, for instance, in the *Reservations* case) it is obliged to discuss either its right to answer the question, or the propriety of doing so—either of which issues may involve the Court in a consideration of the concrete reasons why, and the context in which, the question has been put.⁴

c. The general question whether requests for advisory opinions should

¹ See as to this, the minority views in the *Peace Treaties* case, summarized on pp. 49–50 (nn. 4 and 5 to p. 49) of loc. cit. in n. 1, p. 139, above.

² See *ibid.*, p. 48, n. 1.

³ *Op. cit.* in n. 2, p. 8, above, at p. 466.

⁴ See paragraphs (i)–(iii) above.

be couched in abstract terms or not, is liable to lead to an impasse. The view that the Court should never answer abstract questions, but should only deal with questions relating to particular and concrete situations, would at once involve all the difficulties¹ liable to be created if the Court gives advisory opinions about matters in dispute between individual States which have not consented to any reference to the Court—a reason why certain delegates in the Assembly, and at least one Judge of the Court (Judge Azevedo),² maintained the extreme opposite view, namely, that *all* requests for advisory opinions should be framed in abstract terms. But this would not be satisfactory either. Quite apart from the fact that it would not fully meet the difficulty of absence of consent, it would create other difficulties of its own. It would render certain questions very troublesome to frame at all, or oblige them to be framed in an artificial or unrealistic manner. It would equally involve the Court in a series of purely declaratory statements which, unrelated to a particular case, might be difficult to apply or prove embarrassing in other contexts. The Court has been right to keep its hands, and those of potential requesting entities, free in this matter.

DIVISION B: EVIDENCE, PROOF AND PROCEDURE

(I) EVIDENCE AND PROOF

(1) *Burden of proof*

Reference has already been made, in connexion with the *non ultra petita* rule, to the line taken by the Court in the *Minquiers* case on the question of burden of proof³ when, referring to a provision in the *compromis* between the parties, submitting the dispute to the Court, which established the order of the written pleadings, but which expressly stated this to be 'Without prejudice to any question as to the burden of proof', the Court said (*I.C.J.*, 1953, 52) that this was, accordingly, 'a question which it is for the Court to decide', and that,

'Having regard to the position of the Parties, both claiming sovereignty over the same territory, and in view of the formulation of the task of the Court in Article I, and the terms of Article II [of the *compromis*], the Court is of opinion that each Party has to prove its alleged title and the facts upon which it relies.'

It is clear from the opening phrase of this passage that in arriving at this view, the Court was not influenced solely by the wording of the *compromis*,

¹ Discussed in paragraph (ii) above.

² See references in nn. 1 and 2, p. 148, above.

³ See Division A, § 2 (I) (3), paragraph (a) (ii) above.

but also by the character of the case. In an earlier article¹ some account was given of the three main types of territorial dispute—the ‘occupation’ type (i.e. of a territory alleged to be *res nullius*); the ‘acquisitive prescription’ type (acquisition by prescription of territory owned, or originally owned, by another State); and the ‘claims *longi temporis*’ type (long-standing rival claims to the same territory with the issue turning on the relative weight of each claim). In the first two cases, the general² burden of proof clearly lies on the State claiming title by occupation or prescription, as the case may be; but in the third, it rests on each of the parties to establish the basis of its claim, and it is for the tribunal to weigh the relative merits. In a further article in this series,³ attention was drawn to the great importance that the question of the burden of proof may assume, particularly in the light of the fact that this burden will normally, though not always necessarily, rest on the plaintiff or applicant State in the case—that is to say, on the one seeking to assert a right alleged to have been denied or infringed, or complaining of a wrong done, or of the non-fulfilment of an international obligation. Attention was drawn to the advantages of the defensive, and the fact that in the present state of international law, this may, on account of the burden of proof, make the whole difference between winning and losing the case—for the position will often be that the State whose action has really initiated the dispute, by asserting and exercising a right not admitted by the other party, does not affirmatively have to establish the existence of the right, because this State will be the defendant in a case brought by the party denying the right, upon whom the onus of establishing its *non*-existence may then be held to rest. Since it is not desirable that the outcome of important international litigations should depend upon the accidents of a largely procedural or formal situation,⁴ the line taken by the Court in the *Minquiers* case is to be welcomed as an indication that the Court, in deciding any question of burden of proof, will look not only to any relevant instruments, such as the *compromis* if there is one, but to the general nature of the case itself and the realities involved.

(2) *Effect of non-production of material documents*

The Court (and this is true of international tribunals in general) has no power to compel the attendance of witnesses, production of documents, etc. It can only, as provided by Article 49 of the Statute, ‘take formal note of

¹ This *Year Book*, 32 (1955-6), at pp. 30-37.

² Naturally, in the course of the proceedings, the burden of accounting for particular facts (e.g. a failure to protest) may be shifted to the other party.

³ See this *Year Book*, 30 (1953), pp. 8-9, and nn. 1-3 on p. 9; and also pp. 11-12, and in particular n. 2 on p. 12.

⁴ The way in which this can come about was explained in n. 2 on p. 12 of loc. cit. in n. 3 on this page.

any refusal' or failure in this respect, and the sanction lies in the possibly adverse effect that this may have on the case of the party responsible. In the *Corfu* case, the Court had had occasion to deal with a refusal (on grounds duly explained to the Court) to produce a document the Court called for, but which was of a confidential character.¹ In the *Minquiers* case, one of the parties referred in part of its argument to certain documents, which, however, it did not produce. The Court therefore refused to base any conclusion on these arguments, saying (*I.C.J.*, 1953, 68):

'The United Kingdom Government has further invoked a Judgment of 1692 of the Royal Court of Jersey in litigation between the English King and the guardian of the Seigneur of the fief of Samarès in Jersey, concerning goods shipwrecked on the rocks of the Minquiers. The Court decided that the goods should be shared between the two litigants and the salvors, each taking a third, and it based this decision on "certain Letters" of the King's Privy Council of 1620 and on an Act of 1632. As these documents are not produced, it cannot be seen on what ground the Judgment was based. It is therefore not possible to draw from this Judgment any conclusion supporting the British claim to the Minquiers.'

(3) *Admissibility of documents submitted or filed after the close of the written proceedings.*

In the *Minquiers* case, both parties submitted documents after the close of the written proceedings—in the one case, an expert legal and historical opinion on a point of medieval law, and, in the other, documentary evidence of activity at the Minquiers and Ecréhos groups. Certain of these documents were submitted at a very late stage, after or on the eve of the commencement of the oral proceedings. The submission of documents after the close of the written proceedings is governed by Article 48 of the Rules of Court, which enables either party to submit documents at this stage with the consent of the other, the absence of objection being taken as consent. The party submitting the documents must, however, file them in the Registry of the Court. If objection is taken, the Court can either permit or refuse production. If the former, the party not producing the documents must be allowed an opportunity of commenting upon them and of adducing counter-evidence. In the *Minquiers* case this situation did not arise, as neither of the parties offered objection to the documents thus produced by the other.² Short of offering objection, it would presumably be open to a party to make a formal request for the reopening or prolongation of the written proceedings, or for a simple postponement of the oral proceedings to allow time for consideration and for the preparation of comments to be made at the oral hearing. While it is necessary to allow States some latitude in this matter, it is obviously undesirable that docu-

¹ See this *Year Book*, 29 (1952), p. 60.

² See the Court's published volumes of pleadings in the case, vol. ii, pp. 490 et seq. and 500.

ments should be submitted at so late a stage that the other party is compelled either to forgo any opportunity for a proper consideration of them, or else to make a last-minute request for the postponement of the oral hearing, with all the inconvenience to the Court and the parties which this may involve. Still less desirable is it that documents which have never been filed in the Registry, or gone through the Article 48 procedure, should simply be read out at the oral hearing. This occurred in the *Anglo-Iranian Oil* case, and the acting President gave a warning that unless the provisions of Article 48 were observed, the Court might ignore documents thus produced or referred to.¹ It is therefore to be welcomed that in 1953 the Court issued directions on the matter, making it clear that the submission of further documents after the close of the written proceedings could only be admitted in exceptional circumstances, and in strict conformity with the Article 48 procedure.²

(II) PROCEDURAL POINTS

(1) *Submissions and 'conclusions'*

It is customary for the Court to require the parties, at the end of the oral hearing, to state what their final submissions (Fr. '*conclusions*') are, either maintaining these as formulated in their written pleadings, or, if they please, furnishing a reformulation of them. At various times, the Court has indicated, (a) what it understands by a final submission, in the formal and technical sense of the term; (b) that it will not accept *qua* final submission, or as part of a final submission, propositions that really consist of the reasoning on which the actual submission is or should be based; (c) that it will not accept as submissions, or in general pronounce upon, abstract propositions of law. The question of the nature of the *final* submissions as such, obviously has greater importance where a case is referred to the Court by application, and the exact character of the points to be decided emerges, so to speak, as the case goes on. Where the matter is referred to the Court by a *compromis* or special agreement, the Court will have recourse *primarily* to the *compromis* as regards what it has to decide; but as the *Minquiers* case showed (see below, subparagraph *b*), it will by no means exclusively do so.

a. Nature of a final submission. A party's final submission in a case consists of a statement of what it claims in the case, or is requiring from the Court, and not of the reasoning by reference to which it maintains that the Court should act in accordance with the submission. The submission must also be directed to the actual circumstances of the case.³ The importance

¹ Pleadings in the case, pp. 461-2.

² *Yearbook of the Court, 1953-4*, p. 114.

³ As Rosenne says (op. cit. in n. 2, p. 8, above, at p. 410), 'The submissions are . . . the ultimate concretization of the difference, and upon their formulation depends the efficacy of the adjudication to resolve the difference between the parties.'

which the Court may attach to the submissions as 'fixing in advance the limits of its judgments' was made clear in a passage from the *Asylum* case (Interpretation of Judgment).¹ In the *Norwegian Fisheries* case, the Court, referring to the set of final United Kingdom conclusions, said (*I.C.J.*, 1951, 126):

'Points 3 to 11 appear to be a set of propositions which, in the form of definitions, principles or rules, purport to justify certain contentions and do not constitute a precise and direct statement of a claim.'

Later, the Court said:

'These are elements which might furnish reasons in support of the Judgment, but cannot constitute the decision.'

Put very briefly then, a final submission is a statement, in concrete form, of what the party making it wants the Court to decide in relation to the actual circumstances of the case.

b. Reasoning not accepted as part of a final submission. In contrast to its views about points 3 to 11 of the United Kingdom conclusions in the *Norwegian Fisheries* case, the Court said (*ibid.*) that

'Points 12 and 13 appear to be real submissions which accord with the United Kingdom's conception of international law as set out under points 3 to 11.'

In short, points 3 to 11 consisted merely of statements of the reasons on which points 12 and 13 (in the Court's view the true final submissions) were based. The Court drew the same distinction in the *Minquiers* case (*I.C.J.*, 1953, 52), saying:

'The Submissions reproduced above and presented by the United Kingdom Government consist of three paragraphs, the last two being reasons underlying the first, which must be regarded as the final Submission of that Government. The Submissions of the French Government consist of ten paragraphs, the first nine being reasons leading up to the last, which must be regarded as the final Submission of that Government.'

The Court then said, 'The Submissions of the Parties should therefore be considered to be as follows'—and it accordingly set out the *first* paragraph of the United Kingdom conclusions, and the *final* paragraph of the French conclusions, omitting all the rest. It is clear, however, that the Court, while basing its decision on what it considers to be the actual and final submissions by each party as to what the Court should decide, will have regard to everything that is implicit in those submissions. Thus in the first phase of the *Ambatielos* case, the Court (*I.C.J.*, 1952, 38) drew attention to certain differences between the 'brief but comprehensive final submission' of the United Kingdom Government (made at the end of the oral hearing), and

¹ Quoted in section (I) (3) (b) above.

the final submissions as made in the United Kingdom counter-memorial, which 'were more detailed' (*ibid.*, 37), and added (*ibid.*, 38):

'The brief but comprehensive final Submission obviously includes the jurisdictional objections more particularly set out in the Counter-Memorial.

'It is evident from the above summary that, apart from the jurisdiction of the Court on the merits, the question of its jurisdiction to decide upon the obligation to submit the difference to arbitration is implicit in the final Submissions of both Parties.'

c. The Court's judgment must consist of a decision in the case, and not merely of a statement of the law. The Court may state the law in order to show why it reaches a certain conclusion, but its task is to decide the actual case in a concrete and final¹ manner. In the *Norwegian Fisheries* case the Court said (*I.C.J.*, 1951, 126):

'The subject of the dispute being quite concrete, the Court cannot entertain the suggestion made by the Agent of the United Kingdom Government . . . that the Court should deliver a Judgment which for the moment² would confine itself to adjudicating on the definitions, principles or rules stated [in United Kingdom points 3 to 11], a suggestion which, moreover, was objected to by the Agent of the Norwegian Government. . . .'

The concluding words may imply that, with the consent of both parties, the Court might have been willing to accede to the United Kingdom suggestion, though this seems doubtful. On the other hand, there would seem to be nothing to prevent the Court from entertaining a case which the parties choose not to present in a concrete form at all, but as a dispute about the law which the Court is asked to declare. But evidently, the intentions of the parties in this sense would have to be made very clear, for the Court, after continuing the passage above quoted with that quoted at the end of subparagraph *a* above, concluded (*ibid.*) as follows:

'It further follows that even understood in this way [i.e. as "reasons in support of the judgment"], these elements may be taken into account only in so far as they would appear to be relevant for deciding the sole question in dispute, namely, the validity or otherwise under international law of the lines of delimitation laid down by the [Norwegian] 1935 Decree.'

Here again, it is implicit in the reference to 'international law' that, in coming to a decision on the basis of the parties' submissions, the Court will take into account all the international law reasons which the parties have advanced in support of those submissions. The same point about the inability of the Court to decide an actual dispute on the basis of abstract

¹ That is, naturally, so far as possible at that stage, which, for instance, may be concerned only with a jurisdictional or other preliminary issue. Equally, the fact that a judgment may be open to interpretation or revision (Articles 60 and 61 of the Statute), does not prevent it being 'final' in the sense of Article 60, and for the purposes of Article 59.

² The United Kingdom suggestion was that if the applicable principles of maritime law were first authoritatively determined by the Court, they could then be related to the particular circumstances of the *Norwegian Fisheries* case.

propositions, was taken by Judge Basdevant in the first phase of the *Ambatielos* case when he said (*I.C.J.*, 1952, 68):

'In the Conclusions submitted in its Counter-Memorial, the United Kingdom has employed an abstract form for the statement of its objection to the jurisdiction. The Court cannot deal with a submission so formulated. It has before it a concrete claim that it should state whether the United Kingdom is under an obligation to accept the submission to arbitration of the Hellenic claim relating to the *Ambatielos* case. The Court has to determine whether it is competent to adjudicate upon the existence of such an obligation in the present case.'

(2) *Irrelevant arguments*

In the period under review there was more than one instance of the parties being requested to confine their arguments to what was strictly relevant to the matter actually before the Court at the time. This matter is of course most liable to arise where purely jurisdictional issues (not joined to the merits) are concerned. Because the parties, or one of them, may feel that the Court's view on the jurisdictional issue may be influenced by considerations relating to the merits, there is often a tendency, directly or indirectly, to try and bring these in. This is very difficult to prevent, particularly at the hands of an expert advocate, and in many cases indeed it may be impossible to argue the jurisdictional issue without some reference to the merits. The Court is, however, right, so far as it can, in seeking to prevent this, on account of the strong feeling which most States entertain on jurisdictional issues, which makes it desirable that there should be no ground on which it could be thought that the Court has been influenced one way or the other by ulterior considerations relating to the merits. In the *Anglo-Iranian Oil* case the Court (*I.C.J.*, 1952, 111) said:

'Whether or not the concession contract of 1933 or the settlement of the dispute in that year constituted an agreement between the Government of Iran and the Government of the United Kingdom is a question relating to jurisdiction, the solution of which does not depend upon a consideration of the merits. It can be and must be determined at this stage, quite independently of the facts surrounding the act of nationalization complained of by the United Kingdom.'

And in the second phase of the *Ambatielos* case it said (*I.C.J.*, 1953, 19):

'The Court will use its power of appreciation to resolve the legal problem presented by the Parties, namely, whether the difference between them is of such a character as to come under the Declaration of 1926; but it cannot carry its power of appreciation to the extent of deciding the merits of the difference.'

In both these cases, the Court had occasion to stop Counsel during the course of the oral hearing, in order to request that the argument be confined strictly to the jurisdictional issue.¹

¹ See the Court's published volume of Pleadings in the *Anglo-Iranian Oil* case, pp. 429, 430 and 499, and the same in the *Ambatielos* case, pp. 274, 275 and 304.

(3) *Points not fully argued by the parties*

The Court will not normally decide points unless these have been 'fully argued' by the parties.¹ (This assumes that they have had the necessary opportunity of doing so. If a party fails to prosecute or defend its case, or does not appear at the oral hearing, the Court can of course, under Article 53 of the Statute, proceed to give a decision.) Instances occurred in both the *Anglo-Iranian Oil* (Interim Measures phase) and *Nottebohm* (Jurisdiction) cases. It is true that in the main phase of the *Corfu* case, the Court, dealing with a last-minute jurisdictional assertion by Albania, said (*I.C.J.*, 1949, 23), 'No reason was given in support of this new assertion and the United Kingdom Agent did not ask leave to reply. The question of the Court's jurisdiction was not argued between the Parties'—but the Court nevertheless went into and decided this issue. However, the Court presumably felt that the Albanian Government could have supported its assertion with reasons, had it chosen to do so, and that although this assertion was made during the closing speech at the oral hearing, yet being newly introduced, the United Kingdom Agent could have asked leave to make an additional statement in reply to it. Further, all the main jurisdictional issues had been fully argued during an earlier phase of the case. In the first phase of the *Ambatielos* case, the Court made its attitude quite clear as follows (*I.C.J.*, 1952, 45):

'There now remains the final argument that "the Treaty of 1886 contains no provisions incorporating in the Treaty the general principles of international law with regard to the treatment of foreigners in courts of justice or otherwise and in consequence it cannot be said that the alleged denial of justice in breach of the general principles of international law is a breach of the Treaty of 1886, merely because it is a breach of the general principles of international law".'

'The point raised here has not yet been fully argued by the Parties, and cannot, therefore, be decided at this stage.'

Judge Levi Carneiro while agreeing with this conclusion did not agree with the reason for it, saying (*ibid.*, 51-52):

'In this second phase, the question whether the claim is based on the Declaration of 1926 will be fully examined. One of the points that will then have to be decided is that raised by Counsel for the United Kingdom in his sixth argument, where he contended that the alleged denial of justice committed in violation of the general principles of international law did not constitute a violation of the Treaty of 1886, because this Treaty contained no provision to that effect. I agree that this question ought not to be decided at the present stage of the proceedings, but not on the ground that it has not yet been fully argued by the Parties. That omission by the Parties might be interpreted by the Court; but I consider that it would not be a ground for failing to decide this question, if it were opportune to do so. In fact, it is because this question pertains to the merits of the case that the Court cannot decide it at this time. That is all the more true

¹ It is naturally for the parties to decide what and how much they say: 'fully argued' simply means that all the normal processes of written pleadings and oral hearing have been gone through.

because it is not necessary to consider this question in order to assert the Court's jurisdiction.'

This passage illustrates very well the ambiguities about the meaning of the term 'merits of the case' which have already been discussed, and to which Professor Verzijl drew attention in relation to the *Ambatielos* case.¹

(4) *Judicial precedents*

Both the Court (like its predecessor the Permanent Court) and individual Judges delivering separate or dissenting opinions, have fairly frequently relied upon or cited, or otherwise made use of, judicial precedents—mainly previous decisions of the Court itself or of the Permanent Court, but sometimes decisions of arbitral tribunals²—and a number of instances of this have been given elsewhere in this article or in earlier articles.³ There have also been references to decisions of national tribunals.⁴ This is not because the Court holds itself, in the formal sense, to be bound, even by its own previous decisions. The object is usually either to distinguish a case which it has been suggested in argument ought to be followed, or else as a convenient means of reference to a view which the Court has itself fully explained in a previous case, and which is not considered to need any restatement or development. It is also evident that the phraseology of certain passages in the statements of the Court, and of individual Judges, is not infrequently taken from, or reflects, language used in previous decisions that are not actually mentioned, and in these cases it is usually clear that something like a constant practice (a '*jurisprudence constante*') exists, by which the Court regards itself as *de facto* bound (e.g. the principle of the 'natural and ordinary' meaning of terms, the principle of consent as the foundation of international jurisdiction, etc.).⁵ This tendency has, as might perhaps be expected, been particularly noticeable in the views expressed by Judges trained in the common-law tradition, such as Lord McNair and Judge Read. The latter has gone farther, and in more than one case has used the language of being actually bound by former decisions, to take (or, as the case might be, not to take) a certain view, and in the *Anglo-Iranian Oil* case he made the following statement (*I.C.J.*, 1952, 143):

'Article 38 of the Statute is mandatory, and not discretionary. It requires the Court

¹ See Division A, § 1 (I) (6) (a) above, and reference in n. 4, p. 23.

² See, for instance, the reference to the case of the *Alabama* in the passage from the Judgment in the *Nottebohm* case (Jurisdiction) quoted in Division A, § 1 (II) (a) above.

³ See, for instance, above, § 1 (II) (1) (a) and (II) (2), and § 1 (III) (1) and (3) (c) (ii); also § 3 (i) and (ii). In earlier articles, see this *Year Book*, 27 (1950), pp. 21, 25 and 26; 28 (1951), p. 10; 29 (1952), p. 51; 30 (1953), pp. 27 and 43; and 33 (1957), pp. 213, 245, 247 and 285.

⁴ Several examples will be found in the dissenting opinion of Lord McNair in the *Norwegian Fisheries* case.

⁵ See Division A, § 1 (II) above, *passim*; and in this *Year Book*, 28 (1951), pp. 10 et seq., and 33 (1957), pp. 212 et seq.

to apply judicial decisions as a subsidiary means for the determination of rules of law. The expression "judicial decisions" certainly includes the jurisprudence of this Court and of the Permanent Court. I have no doubt that it includes the principles applied by the Court as the basis of its decisions. It is, however, equally clear that it cannot possibly be construed as requiring this Court to apply *obiter dicta*.¹

It is not believed that Judge Read was here intending to go so far as to suggest that the Court was bound by precedent in the sense that it must actually *decide* the pending case in accordance with any applicable precedent not distinguishable on valid grounds. Article 38, paragraph 1 (*d*), of the Statute would itself preclude that, not so much because it states judicial decisions to be a 'subsidiary means for the determination of rules of law', but because it is prefaced with the words 'Subject to the provisions of Article 59'—the effect of which is that the decisions of the Court are binding only for the parties and for the particular case. The combined result of these provisions is that the Court could not, even if it would, decide a case in a certain way *solely because* a previous case has been decided in that way. On the other hand, Judge Read was quite correct in pointing out that Article 38 is mandatory ('The Court . . . shall apply . . . judicial decisions, etc.'). How are these positions to be reconciled?² It would seem that, although the Court is not obliged to decide (and indeed, in view of the opening phase of Article 38 (1) (*d*), cannot decide) on the basis of previous decisions *as such*, what it can do is to take them fully into account in arriving at subsequent decisions, and that (also on the language of the Article) it is mandatory for it to apply judicial decisions in the sense of employing them as part of the process whereby it arrives at its legal conclusions in the case. Rosenne is certainly right when he says (and the present writer has elsewhere put forward a similar view²) that 'for those who practise international law, judicial decisions, least of all those of the International Court, cannot be relegated to any subsidiary position . . .'.

(5) *Res judicata*

A judgment of the Court has, internationally, the authority of *res judicata*, and this covers all matters which are actually the subject of decision in the judgment. Thus in the *Haya de la Torre* case, the Court (*I.C.J.*, 1951, 77) referred to

' . . . questions which the Judgment of November 20th, 1950, had already decided with the authority of *res judicata*.'

Moreover, although by reason of Article 59 of the Statute, the direct authority of a judgment may be limited to the parties and to the case,

¹ The drafting of Article 38 is, of course, notoriously defective, and not only as regards this particular provision.

² See 'Some Problems regarding the Formal Sources of Law' in *Symbolae Verzijl* (Martinus Nyhoff, 1958), at pp. 168-73.

indirectly it may have a wider sphere of application, and produce legal effects for third parties, even though the decision is not *res judicata* as between such third parties and the actual parties to the case.¹ Thus, in the *Haya de la Torre* case, the existence of a previous judgment ruled out a certain type of third-party intervention in a later case. Unless, however, the point is duly covered by the previous decision, there is no *res judicata*, and therefore nothing (on that particular score) to prevent it being raised in later proceedings. Thus, again in the *Haya* case, the Court said (*ibid.*, 80):

'As mentioned above, the question of the surrender of the refugee was not decided by the Judgment of November 20th. This question is new; it was raised by Peru in its Note to Colombia of November 28th, 1950, and was submitted to the Court by the Application of Colombia of December 13th, 1950. There is consequently no *res judicata* upon the question of surrender.'

In the previous article in this series dealing with jurisdictional and procedural questions, the decision of the Court on the question of *res judicata* in the third phase of the *Corfu* case (Compensation) was mentioned, but it was stated that comment would be deferred until the present article, in order to deal with it in conjunction with the *Haya* case. It is clear that in the latter case, the 'substantive' aspect of *res judicata* was involved. The question was the scope of the previous judgment—did it cover matters being raised by the parties in the extant proceedings? If so, these matters could not now even be raised by the parties. In the *Corfu* case, the point had more of a purely procedural or jurisdictional, and less of a substantive aspect. It operated to preclude the Court from arriving at a decision other or different from the decision it had reached on the same point in previous proceedings. Thus, in the *Corfu* case, the question was that of the *existence* of a previous final judgment, whereas in the *Haya* case it related to the *scope* of the previous judgment. In the first phase of the *Corfu* case, the question of the Court's jurisdiction was fully argued, and decided in the affirmative. There followed the merits (second phase) in which judgment on the main issue was given in favour of the United Kingdom. But in the third phase, instituted in order to assess the compensation due from Albania, the Albanian Government once more disputed the jurisdiction, particularly the jurisdiction to assess damages. The United Kingdom asked the Court to find that the matter was *res judicata*, citing not only Article 60 of the Statute (finality of judgments), but also Article 36, paragraph 6

¹ Rosenne indeed, *op. cit.* in n. 2, p. 8, above, at p. 437, suggests that the sort of point raised by the Cuban intervention in the *Haya de la Torre* case may not really be a case of *res judicata* at all. It was certainly not in any way essential to have recourse to that principle, for it sufficed simply to find (see Division A, § 2 (III) (2) (b) above) that the intervention must, in order to be admissible, relate to matters in issue in the current proceedings, whereas the Cuban intervention, or a large part of it, related in fact to matters the subject of previous proceedings, and not before the Court in the current proceedings.

(right of the Court to determine its own jurisdiction). The Court pronounced as follows (*I.C.J.*, 1949, 248):

‘... the Albanian Government disputed the jurisdiction of the Court with regard to the assessment of damages. The Court may confine itself to stating that this jurisdiction was established by its Judgment of April 9th, 1949; that, in accordance with the Statute (Article 60), which, for the settlement of the present dispute, is binding upon the Albanian Government, that Judgment is final and without appeal, and that therefore the matter is *res judicata*.’

It will be noted that in this passage the Court referred only to Article 60, not Article 36, paragraph 6, thus by implication recognizing the procedural rather than the (substantively) jurisdictional nature of the point. It was not so much that, because of its own previous decision, the Court had no jurisdiction to entertain a further jurisdictional contention, but quite simply that there was not and could not *be* any further jurisdictional issue: the matter was *res judicata*.

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INTERVENTION ON THE GROUND OF DAMAGE CAUSED TO NATIONALS, WITH PARTICULAR REFERENCE TO EXHAUSTION OF LOCAL REMEDIES AND THE RIGHTS OF SHAREHOLDERS

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THE protection of nationals who have their economic activities in foreign countries has frequently been a cause of intervention in modern times. The nationals of some States, generally States belonging to the Western world, have at their disposal capital and technical skill superior to those in other countries and have long found an outlet for these resources in less-developed States. The latter States have then sometimes committed acts having as their object the securing for themselves or their subjects in large measure the benefit of the undertakings established with the capital and technical skill of foreigners, and these acts have often led to intervention by the State whose national has thereby been damaged. The legal basis for such intervention was explained by the Permanent Court of International Justice in a well-known passage in the *Mavrommatis* case:²

‘It is an elementary principle of international law that a State is entitled to protect its subjects, when injured [*lésés*] by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf [*en sa faveur*], a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law. . . . Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.’

The two principal conditions for intervention are then: (1) that the subject has suffered damage by an act committed by a foreign State, and (2) that this act is contrary to international law.

International law, when taken in its proper meaning of law between nations, is frequently called public international law, as distinguished from private international law, which is primarily not an ‘inter-state law’ but a national law which, when a foreign element enters into the private law

¹ Judge Bagge was sole arbitrator in the *Finnish Ships* arbitration, *Reports of International Arbitral Awards* (1934), vol. 3, p. 1481, and a member of the tribunal in the recent *Ambatielos* arbitration (1956, H.M. Stationery Office).

² *Mavrommatis Palestine Concessions* case, *P.C.I.J.* (1924), Series A, No. 2, p. 12.

relations of the parties, decides what system of municipal law is to apply to these relations.)

A claim based on a breach of inter-state law cannot be taken up by the subject himself on the international plane. The foreign national can only use the local remedies provided by the State causing the damage, and there the private international law of this State comes in for the purpose of deciding the applicable municipal law.)

An act causing damage to a foreign subject constitutes a breach of international law when the act is contrary to a treaty to which the defendant State and the State, whose subject's property is damaged by the act, are parties. The treaty is 'inter-state law' between the two States in this respect. The damaging act, committed in breach of international law, forms a sufficient basis for an intervention by the State to whose subject the act has caused damage. Such an intervention may be justified also in cases where the damaging act is contrary to other rules of inter-state law, as these rules are defined in Article 38 of the Statute of the Court of International Justice.¹

But even if the act damaging the individual does not itself constitute a breach of international law, the State may yet be guilty of such a breach by reason of the deficiencies of the local authorities, in administering justice in the case. If the private individual, who is seeking redress from the local authorities of the delinquent State, meets with a refusal of redress resulting from the corruptness of the local authorities, or from the fact that their competence or their procedures are below the standard required by international law, or from the fact that the rules of the municipal law concerning the remedies or the procedure or the substantive law are below that standard or directly contrary to international law, the defendant State is guilty of 'denial of Justice'.]

In both classes of case damage must be caused by acts contrary to international law but in the former case the act itself, which directly inflicts damage on the property of the foreign national, constitutes the breach of international law, while in the second case the breach consists in the denial of justice.

A State intervening because of damage caused to one of its nationals is frequently referred to as 'espousing' the claim of its national. This expression seems somewhat misleading. The claim of the individual, which can be brought forward only on the national plane, must be based on the rights conferred by the applicable municipal law. This law should be in accordance with international law but it may happen that this is not the case. Only the State, however, can base a claim on the fact that such a

¹ The *Finnish Ships* arbitration, *R.I.A.A.* (1934), vol. 3, p. 1481, was such a case, the claim being founded on an alleged taking of the ships without compensation.

difference between the municipal law and the requirements of international law has caused damage to its national. >

On the international plane the intervening State can base its claim only on international law. Municipal law may be taken into account only so far as international law has to refer to its rules for deciding matters which cannot be determined directly by international law but are necessary for its application. Such rules are, for instance, the rules of municipal law concerning nationality.

It seems clear from what has been said that the rules on which the individual and the State are basing their respective claims are so different—the subject's claim is based on municipal law and the State's claim on international law—that it cannot be said that the State 'espouses' the claim of its subject when intervening on the international plane. It is clear (see the word 'lésés' in the French text which is the authentic one) that, when in the passage quoted above from the *Mavrommatis* judgment the word 'injured' is used in the English text, this refers not to 'injuria' but only to the fact that the subject has suffered damage. Whether there is an 'injuria' or not according to the applicable municipal law is without significance.

In the passage from the *Mavrommatis* case cited above another expression is used whose meaning does not seem to be quite clear. It is said that the State by taking up the case of one of its subjects resorts to judicial proceedings 'on his behalf' (*en sa faveur*). At the same time it is said that 'in the eyes of the international tribunal the State is sole claimant', i.e. does not proceed 'on behalf' of its subject. These expressions were not intended to indicate that the subject has a right to the proceeds of the action of the intervening State. The purpose of the action is to 'assert the right of the State to ensure in the person of its subject respect for the rules of international law' (see above, the *Mavrommatis* case). The reparation of the damage caused by the act committed is a sanction for the rule of international law which has been violated. If the reparation is made by paying damages to the intervening State it seems natural that the measure of these damages is calculated by taking into consideration the damage inflicted on the subject. (This damage is one of the necessary grounds for the action. Whether the injured subject has any juridical ground on which he can recover from his intervening State the damages received by it depends upon the law of that State.) It has been said by prominent writers that the subject has only an expectancy, coupled with an interest, of being paid the indemnity collected, less expenses.

Again, it is entirely a matter for the State to decide whether, for juridical or political reasons, the case shall be taken up or not. And, if the case is taken up, the question whether the dispute shall be settled, and on what

terms, is exclusively for the State to decide. The interest of the subject may be taken into account but is not decisive for the State in determining its course of action.

The reason why these expressions 'espousing the claim of the subject' and resorting to judicial proceedings 'on his behalf' are used is probably that the practical result of the action of the intervening State may be that the subject gets redress either by being restored to his rights or more commonly by being handed the damages paid to the intervening State. The result may thus practically be that the subject becomes 'protected' against the foreign State responsible for the damage done.

Nevertheless it seems important, not only from a theoretical but even more from a practical point of view, not to mix up, when stating the accepted purpose of intervention, the protection of subjects and the maintenance of respect for the rules of international law. The application of the rules of intervention depends on a correct comprehension of the purpose.

The Exhaustion of Local Remedies Rule

It is said in the same passage from the *Mavrommatis* case cited above that the State whose subject has been injured has a right to intervene when the subject has been unable to obtain satisfaction through the ordinary channels. So, also, Article 4, paragraph (1) of the proposed Convention on Responsibility of The Hague Codification Conference in 1930 reads: 'The State's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State.' The principle there stated is universally accepted. No claim may be put forward on the international plane by way of intervention as long as the remedies of redress provided by the delinquent State have not been exhausted.¹

This rule is justified from several points of view. If by using the local remedies the subject of the intervening State has got satisfaction for the damage incurred, a claim of the intervening State, having for its object a sanction for a breach of international law by redress of the damage inflicted on the subject, lacks foundation. The State which has committed the act inflicting the damage has ordinarily a right to demand that, before the claim on the international plane may be considered receivable, the channel of local remedies shall be tried and the State thus have an opportunity to do justice in its own way. The sensibilities of the defendant State against

¹ For a recent discussion of this principle, see Institute of International Law, *Annuaire* (1954), vol. 43, p. 5, and (1956), vol. 46, p. 265.

the intervention as being an infringement of its sovereignty should thereby be mitigated and inter-state friction diminished.¹

The action of the intervening State may, and does in general, begin with a mere exchange of views and contentions between the two States. The next stage of the action arrives when the intervening State puts forward a formal claim for redress based on an alleged act which has caused damage to the subject and is claimed to have been committed in breach of international law by someone for whom the defendant State is responsible. The defendant State may then raise the objection of non-receivability, based on an alleged non-exhaustion of local remedies provided by the State through its judicial or administrative tribunals, boards or officials.

The purpose of the rule, as stated above, is that the defendant State shall have an opportunity of doing justice in its own way, that is, of giving redress according to its municipal law for the damage inflicted on the property of the foreign subject. Whether the claim of the private party is rightly or wrongly, totally or partly, dismissed or approved, is from the point of view of the rule of exhaustion of local remedies without importance.²

2 There is a great difference in this respect between the rule of exhaustion of local remedies and the rule concerning the denial of justice. The defendant State is guilty of a denial of justice if the injured foreigner, who has tried to get redress by using the local remedies provided by the defendant State, has failed to obtain the redress claimed because these local remedies have been below the standard required by international law. The rule of exhaustion of local remedies is of another character. It is a rule established for the purpose mentioned above of giving the defendant State an opportunity of giving redress in its own way.

The purpose of an intervention is that, a State having committed a breach of international law by inflicting damage on a foreign subject or his property, a sanction of the violated rule of international law should be provided. This may be done either by a decision of an international tribunal, condemning the delinquent State to reparation or damages, or by redress obtained by the injured foreigner by way of local remedies. The defendant State is entitled to have the opportunity of making use of the latter method. If redress by way of local remedies is not obtained, the intervening State may continue the procedure on the international plane.³

3 If there are no local remedies provided for the claimant foreigner by the defendant State, the rule of exhaustion of local remedies, of course, does not apply. This must be considered to be the case also where the remedies provided are ineffective. If, for instance, the local authorities are notoriously corrupt or their decisions notoriously unfair to foreigners, it would not be

¹ See Freeman, *Denial of Justice* (1938), p. 417.

² Ibid., p. 407.

³ Ibid., p. 416.

reasonable to require that the private party should spend time and money on a recourse which in all probability would be futile.)

If on the merits of the claim the recourse would in all probability be futile, the question whether the rule ought to be applied should for the same reasons be decided in the same way. It has been urged that this would have the effect that unmeritorious claims would be taken out of the rule. The purpose of the rule of exhaustion of local remedies is, however, not the protection of the respondent State against unmeritorious claims on the international plane, and this is not its effect. The way of intervention is open even if an unmeritorious claim is on the national plane dismissed on its merits. The requirements of the applicable law are not the same on the international as on the national plane. But if on the national plane redress is obtained by the foreign subject, the way of intervention may be closed. One of the necessary bases for intervention, a non-indemnified damage inflicted on the foreign subject, is then lacking. The defendant State has had the opportunity to give redress in its own way and has done so.

It must sometimes be extremely difficult, if not impossible, for the international tribunal which has to determine whether on merits of the claim a recourse on the national plane would in all probability have been futile, to form any opinion as to what the local court, which would have had to adjudicate upon the claim on the basis of other contentions and other evidence than those adduced before the international tribunal, would have decided. Even if the facts alleged by the intervening State in the diplomatic correspondence as to damage caused by an act for which the defendant State is responsible may seem to the international tribunal firmly established, there may be other bases required by the municipal law, which are decisive for the acceptance or dismissal on the national plane of the private claim, and whose existence may be a subject for different opinions. Only where such a difference of opinion seems reasonably not possible, e.g. when acceptance of the private party's claim would be contrary to a clear or an uncontested rule of the municipal law or against a uniform course of decisions of the highest local court, ought an application of the local remedies rule to be held unnecessary by reference to the merits of the claim.

Another matter which has to be decided by the international tribunal is whether, the local remedies rule having been so far fulfilled that the private party has put his claim of redress before the local tribunal of first instance, the remedy before this first instance has been sufficiently exhausted. Such an exhaustion takes place when the private claimant has adduced before the tribunal all the material reasonably available to him which might be essential for the winning of the case. It would seem natural to presume that the claimant who has gone to the trouble and expense of bringing his claim before the local tribunal should do everything possible for obtaining the

redress desired. But where the claimant party has in any respect omitted to put forward necessary contentions or to adduce essential evidence available to him, the defendant State may object that the remedy of the first instance has not been exhausted.¹

If the claimant State does not admit the alleged omission by its national to put forward a necessary contention or to adduce essential evidence, the international tribunal has to decide, on the basis of the judgment of the local tribunal as well as of any other relevant material before it, whether such an omission may reasonably be considered to have been established. If so, the remedy in the court of first instance has not been exhausted.

4c. When the remedy in the court of first instance has been exhausted and no appeal to a higher court is allowed, the rule of exhaustion of local remedies is satisfied. The international claim is now receivable if redress has not been obtained.

b. When an appeal is allowed to a higher tribunal against a decision of a tribunal below, and that decision has been left unredressed by the Appellate Court, the rule of exhaustion of remedies is still not satisfied unless the losing party has given all the tribunals up to the highest one the opportunity of reviewing the decision of the first tribunal.

c. The procedure, however, when an appeal is allowed, is different in different States as regards the admissibility of new material. If such new material is admissible before an appellate tribunal, an omission to exhaust the remedy in the tribunal below by not adducing essential material might be repaired in the tribunal of appeal. If the omission is even there not repaired, the same objection of non-exhaustion as is mentioned above in regard to the tribunal of first instance may be made by the defendant State and should be decided according to the same rules as those suggested for the tribunal of first instance.

If new material may not be adduced in the appellate tribunal, the omission before the tribunal of first instance cannot be repaired, but the appellate tribunal should nevertheless have the opportunity of reviewing the decision of the tribunal of first instance on the material there adduced. Should the claim then still be dismissed, the non-receivability of the international claim is maintained on the ground of non-exhaustion of local remedies at the tribunal of first instance.

§ Sometimes, according to the municipal procedure, an appeal is allowed against decisions of law but not against decisions regarding facts. In that event if the claim is considered to have failed on the basis of the facts an appeal on points of law would produce no useful effect.² An appeal is then not required. Again, if the claim is considered to have been made out as

¹ See the *Ambatielos* arbitration (1956), op. cit., at p. 30.

² See the *Finnish Ships* arbitration, *R.I.A.A.* (1934), vol. 3, pp. 1535-43.

to its facts but is dismissed on a point of law which is really not open to argument, an appeal is obviously futile and should not be required.

The practical political character of the rule of exhaustion of local remedies appears from its purpose. The defendant State, which is accused of a breach of international law, has to be given an opportunity of giving redress in its own way. Any feeling of an infringement on its sovereignty will then, as said above, be as far as possible mitigated. But this involves the national of the other State making use of the local remedies provided. He may thereby incur expense and trouble to no purpose. The interest of the private party not to be unnecessarily exposed to such consequences must also be taken into consideration.

The international tribunal which has to decide whether the requirements of the rule of exhaustion of the local remedies are fulfilled or not should therefore try to arrive at a reasonable compromise between these interests. The rules above suggested are an attempt in this direction, partly based on two international arbitrations in which the writer has taken part.¹

The Rights of Shareholders²

A question connected with the present matter of intervention which also may be of a practical importance to a foreign subject who has suffered damage by an act committed by a State, is the right of intervention of the State whose subject is a shareholder in a corporation damaged by this act. It is, of course, not possible to base an intervention on any indirect loss whatever which a foreign subject may have suffered by damage caused to the property of a corporation. It is true that in the *Tlahualilo* case³ the British and American governments did not accept the Mexican contention, that the fact that the Tlahualilo Company, whose property had been damaged by an act of the Mexican State, was Mexican, could operate as a bar to intervention based on the damage caused to British and American bondholders by reason of damage inflicted on the property of the company. Nevertheless, it seems doubtful whether damage thus caused to a bondholder can properly form a basis for an intervention. The shareholders, it would seem, are in a different position. As component parts of the corporation they have an actual share in its assets even though during the existence of the corporation their possibility of enforcing rights based on this share independently of the corporation is limited by the municipal law applicable to the corporation. If the value of their share in the actual surplus

¹ The *Finnish Ships* arbitration (1934), op. cit.; *Ambatielos* case (1956), op. cit.

² See generally Sir Eric Beckett in *Grotius Society*, 17 (1931), p. 175; J. Mervyn Jones in this *Year Book*, 26 (1949), p. 225; S. Friedman, *Expropriation in International Law* (1953), p. 173; I. Foighel, *Nationalisation* (1957), p. 108; Bindschedler in *Recueil des Cours*, 2 (1956), p. 231; Charles de Visscher in *Revue de Droit International*, 3rd Series, 15 (1934), p. 624.

³ *United States Foreign Relations* (1913), p. 1003.

assets of the corporation has been diminished by the damage inflicted on its property, the damage thereby caused to the shareholder seems to be so intimately and directly connected with the damage inflicted on the property of the corporation that it should reasonably be considered to constitute a sufficient basis for intervention.

On the international plane, the condition for a claim by the intervening State is that the subject has suffered damage by the act committed by the foreign State and not that the subject himself is the bearer of the right to lodge a claim for damages. The conclusion ought then to be that if the shareholder has suffered damage by the act committed by the foreign State and this act constitutes a breach of international law, there is, according to the international rule mentioned above, sufficient ground for an intervention by the State whose subject the shareholder is.

The international claim against the defendant State based on the damage caused to the shareholder is receivable without regard to the exhaustion of local remedies by the shareholder himself as there are no such remedies open to a shareholder. The fact, however, that the damage caused to the shareholder has its origin in a damage, inflicted on the property of the corporation, for which redress may be asked by this juridical person on the national plane and which may form the basis of an intervention on the international plane by the State whose subject the corporation is, complicates the situation.

The corporation cannot be deprived of its rights as regards claims based on damage inflicted on its property, by the fact that the damage caused to the shareholder may form a basis for an international claim of indemnity. When a settlement has been arrived at between those who are acting for the corporation and the State responsible for the damage, even if the settlement leaves more or less of the damage unredressed (assuming that it was not the result of a conspiracy inflicting wrong on the corporation) or when a settlement has been arrived at on the international plane between the State, whose subject the corporation is, and the damaging State, no claim on the international plane can be put forward on the basis of the damage caused to the shareholder. If this were not the rule, it would be practically impossible to settle such disputes by agreement out of court. Nor can an intervention based on damage caused to the shareholder be receivable if an international authority has dismissed an intervening State's claim based on the damage inflicted on the property of the corporation.

But where it is clear that no claim of the corporation can be made on the national plane and that the damage inflicted on the corporation cannot form a basis of an intervention on the international plane, then the damage caused to the shareholder may form a basis for an intervention.

On the national plane, no claim is possible for the corporation by means

of a local remedy if there are no local remedies available. Nor can redress be obtained by the corporation on the national plane if the local remedies have been exhausted by it without the claim having been recognized.

On the international plane no claim can be put forward based on damage caused to the corporation if the damage is inflicted by an act committed by the State whose subject the corporation is. Nor can it be done when the State, of which the corporation is a subject, is not the same at the time of the damaging act and at the time when the claim is put forward. It is a generally accepted condition for intervention that the State whose subject the injured claimant is should be the same at both these periods.¹

The possibility of bringing forward an international claim based on the damage caused to the shareholder is thus dependent on the non-possibility of putting forward any claim, whether on the national or on the international plane, based on the damage inflicted on the corporation.

No precedents lending direct support to a general rule giving a right of intervention in case of damage caused to the shareholder by damage inflicted on the corporation can be cited either from national or from international practice. Prominent writers have considered that the notion of 'piercing the veil'—the veil which the juridical personality of the corporation, everywhere accepted in municipal law, puts between the shareholder and the assets of the corporation—has been accepted both by national and international courts. But the precedents cited do not seem convincing.

Decisions in the courts of the U.S.A. have been cited but in these cases the purpose of the 'piercing of the veil', as there applied, is not to give the shareholder a claim based on damage inflicted on the property of the corporation, but to protect the creditors of the corporation or of the shareholder against steps taken by them in common for evading, by making use of their separate juridical identity, responsibility for obligations in a way which is contrary to the purpose of company law.² Such an exception may be justified in special cases but does not show the existence of a generally applicable rule of 'piercing the veil'.

English law based on an old English case, *Foss v. Harbottle*,³ comes nearer the present problem as it is concerned with the right of a shareholder to bring proceedings in his own name, where the majority will not allow an action to be brought in the name of the company and the act complained of is of a fraudulent character or oppressive or is *ultra vires* of the company, or where the wrongdoers control the majority of votes or the majority approve the act impugned by the individual shareholder. But even here it

¹ See *Panevezys-Saldutiskis Railway case*, *P.C.I.J.* (1939), Series A/B, No. 76, p. 16.

² See Rolf Seriek, *Rechtsform und Realität juristischer Personen* (1955), p. 70.

³ (1843), 2 Hare 461; see also Halsbury, *Laws of England* (3 ed., 1954), vol. 6, pp. 418 and 445. *Foss v. Harbottle* is referred to by Sir Eric Beckett and J. Mervyn Jones in their articles mentioned above, p. 169, n. 2.

is a matter of closely defined exceptions and not of a general rule of 'piercing the veil'. Besides, these exceptions, like those allowed by United States tribunals, have not been accepted outside these countries to such an extent that they can be considered as 'general principles of law recognised by civilised nations'.

Other precedents cited in support of 'piercing the veil' are those of national courts who have decided that a corporation which is controlled or otherwise influenced by enemy shareholders, even if the corporation itself is the subject of a friendly State, should be considered as falling under the category of enemies for purposes of national war legislation. But the reason which here makes the 'piercing of the veil' justified—the protection of the State in war—cannot be adduced for justifying the recognition of a shareholder's right to have the national company-law rules concerning the juridical personality of the corporation set aside in order that he may be indemnified for damage caused to the corporation.

On the international plane the precedents do not give a clear picture of the present state of the international law as regards the question of intervention on the basis of damage caused to shareholders. In the most often cited precedent—the *Delagoa Bay* case¹—a British corporation held shares in a Portuguese corporation, and American subjects were shareholders in the British corporation. The Portuguese Government had cancelled the railway concession accorded to the Portuguese corporation and seized the railway belonging to the corporation. The British Government based its intervention on the alleged fact that the Portuguese Government had violated the rights and injured the interests of the British shareholder in the Portuguese corporation. The British Government added that this corporation being practically defunct, the British shareholder had no remedy except through the intervention of its own Government. The American Government said that the Portuguese corporation was without remedy and had now practically ceased to exist and that the only recourse of those whose property had been confiscated was the intervention of their respective governments. The question of the amount of the compensation was then referred by the three governments to arbitration.

The *Delagoa Bay* case was cited by the United States Government in the *Romano-Americana* case² in 1925, which began with a claim by the United States Government against the British Government based on damage which, according to the contentions of the United States Government, the British Government had inflicted on a Roumanian company whose shares were almost entirely in the hands of an American citizen. The British Government admitted that many cases might be cited in which

¹ Moore, *International Arbitrations* (1898), vol. 3, p. 1865.

² Hackworth, *Digest of International Law* (1943), vol. 5, p. 840.

a government had used its good offices in the interests of its own nationals who are stockholders in a foreign corporation. It pointed out, however, that the cases, in which the right of a government to intervene on behalf of the shareholders of such a corporation for the purpose of establishing a claim against another government has been admitted, would be found upon examination to be few in number and to exhibit certain marked characteristics, none of which were present in the case under consideration. The British Government added that where by special agreement between the two governments a right of compensation has been accorded to the shareholders, no principle of international law can be deduced therefrom. It further contended that where the action of the Government against whom the claim is made has, in law or in fact, put an end on the Company's existence or, by confiscating its property, has compelled it to suspend operations, this is in fact not an exception but an application of the general rule; for it is not until a company has ceased to have an active existence or has gone into liquidation that the interest of the shareholders ceases to be merely the right to share in the company's profits and becomes a right to share in its actual surplus assets. The British Government observed that this was not the position in the instant case and the United States Government dropped its claim against the British Government.

The decision in the *Delagoa Bay* case, as interpreted according to the contentions of the British Government in the *Romano-Americana* case, cannot be considered as supporting a general principle of 'piercing of the veil'.

The United States Government, after having dropped its claim against the British Government, had recourse to the Roumanian Government who, according to an agreement then made with the United States Government, paid an indemnity to the Roumanian company, not to the United States Government.¹ Therefore, the Roumanian case also cannot be cited in support of a general principle of 'piercing of the veil'.

According to the award of the arbitrator in the *El Triunfo* case² the question of the right of the United States under international law to make reclamation for American shareholders in the El Triunfo Company, a domestic corporation of Salvador, was not discussed for the reason that 'the question of such right is fully settled by the conclusions reached in the frequently cited and well understood Delagoa Bay Railway question'. The *Delagoa* case, however, does not seem clear on that point; the British interpretation of it is not in conformity with the one adopted by the *El Triunfo* arbitrator.

Even where in other cases, cited as precedents, intervention has taken place based upon damage caused to shareholders, these cases exhibit, as has been said, 'certain marked characteristics' which make it impossible

¹ Hackworth, op. cit.

² *United States Foreign Relations* (1902), p. 859.

or difficult to draw any conclusions as to principles applied in this matter. In these cases, either the arbitration agreements were in such terms that the question whether an intervention should or should not be allowed did not come up (see the *Cerruti*,¹ *Alsop*² and *Orinoco*³ steamship cases), or the right to compensation was recognized by special agreements between the governments, and no rule of international law concerning the principle governing intervention can be deduced from them.

In the *Ben Kiran* case in 1924,⁴ however, the principle itself was discussed. The private person, whose case was taken up by the British Government, was a British member of a firm constituted under Spanish law and of Spanish nationality. In view of the Spanish nationality of the firm, Spain contested the British rights to bring a claim. The Arbitrator (Judge Huber) made an interesting statement:

'The jurisdiction of international tribunals recognises the possibility of distinguishing for the purposes of international arbitration between the component parts of an association itself. International law, which in this matter is governed mainly by considerations of equity, has not so far established any formal test for admitting or refusing diplomatic protection of national interests bound up with interests vested in another nationality. It is necessary to examine whether the person on whose behalf the claim is brought forward is directly affected by the damage, or whether he is merely a creditor of the juridical person directly affected by the damage.'

The Arbitrator rejected the claim; but he did so on the merits of the case and did not examine the question whether or not the intervention of the British Government was admissible.

The statement in the *Ben Kiran* case seems to lend a certain support to the above conclusion, that there are cases where, if a shareholder has suffered damage by the act of a foreign State inflicting damage on the property of the corporation (and this act constitutes a breach of international law), there may be sufficient grounds for an intervention by the State whose subject the shareholder is.

To draw any conclusions concerning the present state of international law from political inter-state treaties, where the solution may depend on the superior power of one of the parties, or from treaties of peace, in which the victorious States impose their will on the vanquished, is not possible before it can be stated that the stipulations there found have been accepted also by a sufficient number of other 'civilized' nations or are otherwise to be considered as international law under the rules in Article 38 in the Statute of the Court of International Justice. In the present matter this can hardly be said to be the case.

¹ *Revue générale de droit international public*, 6 (1899), p. 593.

² *State Papers* (1911), vol. 104, p. 843.

³ Ralston, *Venezuelan Arbitrations* (1904), p. 72.

⁴ *R.I.A.A.*, vol. 2, p. 729.

But even if the conclusion be correct which, for reasons mentioned above, the writer has arrived at, that an intervention may be justified on the ground that the shareholder, as component part of the corporation, is damaged by the damage inflicted on the corporation, and even if the problem of the competition between the States who base their claims respectively on the damage caused to the corporation and on the damage caused to the shareholders is solved in the way above submitted, there remains the question of the competition between different States who base their intervention on damage caused to shareholders, the shareholders not being the subjects of the same State.

In this case it would not be fair to the defendant State that it should have to defend itself in legal proceedings on different occasions concerning international claims by different States based on the same act, with the possibility even that different international tribunals might come to different results. Rules must be applied which prevent such inconveniences. An international claim based on damage caused to a shareholder, who does not hold all the shares in the corporation, should not be receivable unless an effective co-operation between the States intending to put forward claims of this nature has been arranged.

The same should be the case where the consequence of different rules in different States concerning the nationality of corporations is that the corporation, which has suffered damage, may be considered a subject of several States.

The rules of intervention are of a semi-political, semi-juridical character. They should neither be so strictly formulated nor in practice so strictly applied that the good relations between nations would be imperilled instead of improved, as should be the purpose. The writer is well aware that for several of the solutions here submitted no precedents nor any other authorities can be cited. But they are put forward in all modesty in the hope that they may be discussed and that the outcome of the discussion may in due course become a 'subsidiary means for the determination of rules of international law' on the subject in question.

THE THEORY OF RECOGNITION IN *FIERI*

By PROFESSOR C. H. ALEXANDROWICZ

I

THE historian of international law who attempts an inquiry into the law of recognition of States and governments in its formative stage, particularly into eighteenth-century sources, is bound to consult the first historical survey of the literature of the law of nations by D. H. L. Ompteda, published in 1785.¹ Ompteda, a half-naturalist half-positivist who conceives the law of nations on the traditional basis of the law of nature subject to modifications brought about in the intercourse between nations by their express, tacit or presumed consent, refers to problems of recognition under the general heading of the fundamental right of nations to freedom and independence. In the absence of any precise and formulated theory, recognition had not found a separate place in the works of the classic writers whether of the naturalist or early positivist period, and this is the reason why Ompteda observes that nothing special has been written on the subject. All the essays mentioned by him as being directly or indirectly relevant to problems of recognition of new States or rulers are, with the exception of a short essay by F. C. Moser, written by comparatively unknown authors. Among them Justi and Steck are perhaps the most active participants in the first attempts at formulating a theory of recognition.² The purpose of this paper is to draw the attention of historians of international law to these early attempts, and particularly to the direct influence of Justi and Steck on Martens and Klueber, and through them on Henry Wheaton and some of the early nineteenth-century writers.

Justi's essay appeared in his historical and juridical studies published in Frankfurt in 1760; its rather lengthy title is: 'Discussion of the question whether the protests of third monarchs against the election of a person to the throne of an elective monarchy are justifiable in the law of nature and the law of nations.'³ The problem of recognition arose here in connexion with the position of elective rulers within the family of nations. While the legitimate rights of succession of hereditary monarchs were generally accepted in the international field, the election of a ruler in an elective monarchy not infrequently presented complicated problems because of the

¹ *Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts* (1785), p. 484.

² Ompteda, op. cit., quotes also F. A. Kunhold's *Diss. de Statu Naturali Rerum Publicarum* (1723); and F. C. Moser's essay on the 'Rights of a Sovereign, etc.' (*Kleine Schriften*, pp. 287-347).

³ See Johann Heinrich Gottlieb von Justi, *Historische und Juristische Schriften* (1760), pp. 185-99. It is interesting to note that Justi was a British Royal Counsellor of Mines (*Königlicher Grossbritannischer Bergrath*).

external influence exercised by foreign rulers on the elections. For instance, Justi quotes the opposition of certain German princes to the election of the Austrian dynasty to the throne of the German emperors.

Before going into Justi's argumentation we may state that the problem which he puts before us is one of recognition of the new head of a State. At that time the ordinary ruler represented generally the supreme executive power of the State in so far as his ministers were responsible to him and not to the representatives of the people assembled in a legislature, and the problem was therefore in essence one of recognition of governments.

Justi asks the question: What is the validity in the law of nations of protests of rulers who oppose the election of an undesirable Prince in another State, one, for instance, who is not likely to observe the sanctity of treaties? To answer this question he enters first into considerations of a political nature and comes to the conclusion that power politics played by rulers in relation to an elective monarchy may involve the latter in endless complications and chaos as demonstrated by the example of Poland (an elective monarchy) in the eighteenth century.¹ To avoid such arbitrary action on the part of foreign powers, an elective ruler must, according to Justi, be treated on the same footing as an hereditary ruler. If his people consider him worthy of election to the throne of their country and useful to their welfare, they endow him automatically with the same rights which an hereditary ruler enjoys according to traditional principles of legitimism. They need not look to the policy of other States, as their welfare is the supreme consideration. Thus Justi lays down the general rule that the succession to the throne of an elective monarchy (as in an hereditary monarchy) is not capable of being validly challenged by other States. In Justi's view an elective monarch cannot concede to other rulers the *right to recognition* as this would mean intervention and result in submission which would stultify the fundamental right of States to equality guaranteed by the law of nature and nations. The elimination of recognition is further justified by the following considerations: a country may have its internal State secrets which explain the choice of its elective ruler in conformity with its interests. These secrets cannot be made known to other States which cannot set themselves up as judges of government succession in foreign countries. Moreover, *sovereignty* is during the interregnum vested in the whole State as such and the latter is under no duty to tolerate an interference from outside just as a reigning ruler could not accept it according to the law of nations.

Exceptions to this rule serve only to confirm its essential validity. It might seem that such an exception is afforded by the right of the German

¹ Justi illustrates this point in a somewhat Machiavellian way by saying that 'our enemy may become the friend of our neighbour' and our friend 'may become the enemy of a third neighbour' all competing for influence on the election of a monarch.

Emperor to exclude a cardinal from the election of the Pope and so to influence the result of the election. However, this right is a relic of old times and cannot, according to Justi, support a commendable principle.¹

Another exception may occur in the case where a ruler assumes a higher rank or title than he actually enjoys. In principle he may, according to Justi, receive a higher rank or title from his own subjects but if he tends to derive it from third powers he must secure their recognition. In particular Justi observes that the assumption of a higher rank may entail changes concerning status and ceremonial which cannot be imposed on third powers but must be recognized by them. On the other hand, if an elective ruler derives his rank legitimately from his predecessors in power, it is bound to be recognized by other States as its denial would amount to a violation of the law of nations. In case of such denial of status the elective ruler, in the absence of a supreme international agency which could settle inter-State disputes, may take counteraction and either assert his rights by exercising military pressure, or, if this should prejudice the welfare of his subjects, he may proceed to reprisals. Thus he may retaliate against non-recognition by mutual non-recognition. 'Who would deny to a lawfully elected ruler', says Justi, 'the right not to recognize the Kings of France and Spain as such if they denied him recognition of his position which he obtained by an indisputable election? The Law of Nations would fully approve of such action.'

The following observations may be offered to Justi's argumentation:

(1) In his attempt at analysing the problem of recognition of rulers, Justi is faced with the traditional principles of dynastic legitimacy which in his view fully apply to the succession of hereditary rulers. Sovereignty in an hereditary monarchy is derived and perfected from within and vests in the Sovereign. As his legal status does not depend on foreign powers, the problem of recognition does not in principle arise.

(2) As to elective rulers, Justi divides his reasoning into two parts: he states first the general rule and then enumerates exceptions to it. He makes it clear that during the period of an interregnum before the election of a new monarch by the people, *sovereignty* is in the whole State. Thus, if through the will of the people the State elects a new ruler, he derives his position, similarly to an hereditary ruler, from within and becomes the sovereign in the full sense of the word. As Justi equates elective with hereditary sovereigns, third powers have no power of recognition. Acts of recognition or non-recognition of elective rulers which occur in State practice cannot make or unmake the new Head of the State and its Government, as the Law of Nations relies on the *fait accompli* created in the internal

¹ But see the protest of the Austrian Emperor against the election of Cardinal Rampolla at the Conclave in 1903.

law of the country concerned. Foreign powers have no right to interfere with the succession in an elective monarchy as this would result in submission of the latter and offend the principle of equality of States.

(3) Thus according to Justi the elective ruler enjoys in the same way as an hereditary ruler the right to oppose intervention of foreign powers except when he is guilty of revolt, breach of peace or violation of treaties.

(4) While the problem of recognition does not in principle arise in the above case, it gains importance in the case of assumption of a higher rank or title by an elective ruler. Though Justi's remarks in this respect refer to situations which would not occur today, they nevertheless throw light on a *sui generis* conception of recognition which has general significance. Justi observes that recognition is unnecessary when the ruler *derives* his rank or title from his own people. In that case its legitimation takes place from within, without need of external approval (*Einwilligung*). But if he *derives* his rank or title from other powers, then recognition is necessary to perfect his status.¹

On the other hand, if an elected ruler *derives* his rank or title legitimately from his predecessors in power, non-recognition would be a violation of the law of nations. Justi's views in this respect are revealing: he says that in the absence of an international authority which could consider complaints against a State wrongdoer, the elective ruler himself may proceed to the enforcement of his right. If he considers the use of arms inconsistent with the welfare of his subjects, he may apply reprisals, for instance by mutual non-recognition, and Justi makes it clear that a ruler whose rights are offended could fight back with the help of non-recognition even against such powerful kings as those of France and Spain.

It follows from the foregoing that there are two main aspects of the problem of recognition to which Justi seems particularly to pay attention, first, what may be called its derivative aspect, and second, its tortious aspect. The classic doctrine of legitimacy relating to hereditary monarchies is no doubt at the basis of his reasoning. As the legal status of the ruler is derived and perfected from within and as internal legality determines external legality in the law of nations, foreign powers cannot by recognition confer on a ruler rights which are not capable of being derived from their action. The extension of this doctrine from hereditary to elective rulers whose position is based on popular sovereignty is a significant factor in Justi's essay.

Where, however, a particular rank or title of the elective ruler is derived from without, i.e. from the actual concession of foreign powers, its recognition is exceptionally conceded. Whether conceded or not, the term 'recogni-

¹ See also Christian Wolff, *Jus Gentium in Methodo Scientifica Pertractatum* (*The Classics of International Law*, ed. by J. B. Scott), pp. 125-6.

tion' as used by Justi in the above cases signifies approval (*Einwilligung*) which is tantamount to a constructive or constitutive act.

On the other hand, Justi refers to acts of recognition in actual State practice in another meaning also, that of acceptance by third powers of the *fait accompli* established within a particular State. In fact foreign powers are said to be under the duty to 'recognize' elective rulers, the duty lying in the acknowledgement of situations of fact and in the respect for the significance and the consequences which the law of nations ascribes to them.¹ The term 'recognition' means here an act declaratory in nature. But, as was later brought into relief by Steck, foreign powers need not acknowledge situations of fact by express recognition but should simply accord proper treatment to new sovereigns by the maintenance of intercourse. The use of *Erkennung* (recognition) in two different meanings may lend itself to misleading interpretation but this can be safely avoided if the derivative aspect of sovereign rights and the intrinsic nature of acts of recognition as emphasized by Justi are kept in mind.

The tortious aspect of the problem is according to Justi intimately connected with the above considerations. For if one ruler takes action against the succession of a ruler in another State, he assumes an unauthorized power by interfering in what is legally constituted beyond his reach. This is intervention which offends the natural equality of States and amounts to a delictual act. As such it entitles the aggrieved party to take counter-action and even to apply mutual non-recognition which, though in itself illegal, is applicable by way of reprisal.

In conclusion Justi states that he considered the whole matter on the basis of the law of nations and nature and not from the point of view of what he calls State prudence (*Staatsklugheit*). As to the latter he observes that though it must be derived from the law of nations, it relies also on other sources, obviously connected with political expediency (see below). Justi makes it clear that he formulated his arguments without reference to other writers. His essay is no doubt one of the first original efforts to sort out problems of recognition in a fairly systematic way.

II

Whereas Justi is concerned with the problem of recognition of a ruler (Government), Johann Christian Wilhelm von Steck, a German professor of law well known in the eighteenth century, concentrates on the problem

¹ See also Johann Jacob Moser, who, referring to newly elected sovereigns, speaks about the duty of their recognition by other powers (*Beyträge zu dem neuesten Europäischen Völkerrecht in Friedenszeiten* (1778), vol. i, p. 329). But he also makes it clear that succession of sovereigns is the internal affair of the State concerned and all that foreign powers should do is not to make difficulties in its recognition which would amount to intervention (*Grundsätze des jetzt üblichen Europäischen Völkerrechts in Friedenszeiten* (1763), ch. v).

of recognition of States. He opens his essay on 'The Recognition of Independence of a Nation and a State' (published in 1783 in his collection of essays on various political and legal matters¹), with the consideration of the case of the rebellion of a nation, province or colony against the mother State. Such rebellion, assumes Steck, may take place because of tyrannical treatment, breach of treaties, violation of principles, privileges and liberties, or, refusal of protection. The whole process of emancipation of the new State is envisaged by Steck in several stages. The first is the formal and solemn declaration of independence from the mother State. Such a declaration, Steck proceeds, was made by the Netherlands in 1581 when the King of Spain was declared deprived of his overlordship (*Oberherrschaft*) and the people of the Netherlands declared themselves free and sovereign.²

Another example quoted by Steck is that of the Tartars of Crimea who repudiated obedience to Turkey in 1772 and declared themselves an independent State no longer subordinated to their previous overlord. In this respect Steck quotes Moser who gives more details concerning the case.³ The discontinuance of the Turkish-Crimean relationship was connected with the simultaneous conclusion of a treaty between the Crimean Tartars and the Russian Empire in 1772 in which the former sought the protection of the latter. The hereditary ruler of Crimea, Sagib-Giray, announced at the same time 'that he regained his ancient liberty and independence and that Crimea had become a State independent of foreign powers'. He 'expressed the hope that the Sublime Porte will accept it and leave Crimea in the enjoyment of her rights which belong to her by the law of Nature and ancient privileges of the Tartars'.⁴

Finally, the third and most important case quoted by Steck is the Declaration of Independence of North America in 1776.

The declaration of independence is only the first stage. Steck observes that by itself it is not a sufficient title to independence, at least no longer than it is asserted and possessed. In the second stage the mother State should be induced (peacefully) or compelled (by arms) to renounce its sovereignty, to accept the separation and thus to recognize the independence of the new State.⁵ Here the example of Switzerland serves as an illustration. The independence of the Helvetian Republic, though *de facto* enjoyed by its people for a long time, was recognized by the German

¹ von Steck, *Versuche über verschiedene Materien politischer und rechtlicher Kenntnisse* (1783).

² Steck quotes also the declaration made by the Netherlands in 1579 in the Union of Utrecht.

³ Moser, *Versuch des neuesten Europäischen Völkerrechts* (1778), vol. vii, pp. 126-7.

⁴ In connexion with recognition of new States Moser (op. cit.) discusses three cases: (1) that of Corsica which claimed unsuccessfully independence from France, (2) that of Crimea, and (3) that of the U.S.A. As to the latter Moser observes that third powers were more or less neutral *vis-à-vis* the North American colonies but he mentions a notice of Congress at Philadelphia of 10 December 1776 relating to the assistance received from foreign powers.

⁵ In this respect Steck relies on Vattel's *Droit des Gens* (Part I, Book 1, ch. xvii).

Reich only in the Peace Treaty of Westphalia after the Imperial decrees of 6 and 14 May 1647 had been issued.¹

Steck discusses then the case of the Netherlands in its second stage. The independence of the Netherlands was recognized by the King of Spain and the House of Austria in the armistice treaty of 9 April 1609 and afterwards confirmed in the Peace Treaty of Münster between the Spanish Crown and the United Netherlands of 30 January 1648 (Article 2).²

As to Crimea, Turkey had to recognize the independence of the former in the Peace Treaty of Kainardgi in 1774 concluded with Russia. Only religious dependence and the rights of the Sultan as the Caliph were preserved.

As to the United States, Steck notes that Great Britain after her frustrated efforts to restore the position in the American colonies had to renounce her sovereignty and to recognize them as a free, sovereign and independent State.

After having discussed the relationship between the new State and the mother State, Steck proceeds to the third and most important problem, that of the relationship between the new State and third powers. In this respect Steck observes that once the mother State recognized the new State, the latter 'does not require the recognition of third powers' ('so bedarf es der Erkennung anderer Mächte nicht weiter'). They must then treat it as a free and sovereign people and it is not in their discretion to concede or to refuse these qualities as they did not have any overlordship over them. If the overlordship of the mother State comes to an end, other nations have no right to force the new State back into submission which would obviously amount to intervention in its affairs. 'In the eyes of all other [States] it is thanks to the natural equality of nations free and independent.' Here Steck draws his conclusion by quoting the example of Spain and her recognition policy towards the U.S.A. and says: 'It would be preposterous to believe that Spain, after England has liberated the USA from all submission, would make difficulties to recognise them as an independent State.' But Steck emphasizes that 'it would be equally absurd to expect all other powers to *recognise* the USA expressly as an independent State. They must rather regard them and treat them now as such and they cannot refuse to meet them in the above capacity, to receive their envoys and treat them as those of a free State.'

On the other hand, third powers cannot, according to Steck, recognize a new State before the mother State has renounced its sovereignty even if

¹ Steck quotes Moser's *Gerettete Souveränitet der Eidgenossenschaft* (1731).

² According to Steck it was stipulated in Article 53 that the Spanish Crown would receive an assurance from the Emperor and the Reich that they would maintain neutrality, good neighbourhood and amity. This declaration was also issued by the Emperor and the Reich and though it did not contain an express recognition of independence of the Netherlands, it was tacitly implied in it.

the rebelling people disclaimed their obedience, separated themselves and asserted their freedom with arms. Such recognition would amount to unfriendly intervention. In this respect Steck quotes the example of the premature recognition of the United States by France¹ and expresses his own view in the following words: 'One can hardly think of a more serious offence than that of declaring a people which abandons its mother State and tears itself away from it as absolved of its obligations and of recognising such a people free and independent'; and further: 'Such declaration and recognition by a third power has merely an effect in relation to the latter but cannot affect the sovereignty of the mother State from which a defaulting people separates itself, *provided the mother State can assert its real sovereignty*. The people recognised as independent by a third power draw no further benefits from such recognition than appropriate treatment by the recognising power which will send and receive envoys, conduct negotiations, enter into alliances and give full assistance to the new entity.' However, Steck adds that 'if the mother State succeeds in restoring the position and in submitting the rebelling State to obedience, the recognition of third powers would not afford a basis for independence'.

The following conclusions may be drawn from these statements:

(1) Steck, like Justi, belongs, subject to reservations, to the legitimist school and considers the release of a new State by the mother State as essential for its sovereignty and independence.² Such sovereignty is in principle derived from within, i.e. from the declaration and assumption of independence and its recognition by the legitimate Sovereign, the mother State.

(2) The position of third powers in relation to the new State is therefore different before and after its recognition by the mother State. Once the latter recognized the new State, there is nothing that third powers can add substantially to its legal status in the law of nations. Though Steck eliminates recognition (*Erkennung*) by third powers in the meaning of a constitutive act, he says at the same time that third powers should recognize (*erkennen*) the released State in another meaning, i.e. by the establishment of diplomatic, treaty and other relations. Referring to the United States of America after their release by Great Britain, he emphasizes that it would be absurd to expect their express recognition by third powers. The latter must simply

¹ Steck quotes the French-American Treaty of Commerce concluded on 6 February 1778 which meant recognition of the unified English colonies in North America as an independent State. At the same time an alliance was entered into by the two powers. The King of France then notified the English Court of the above arrangement. Great Britain, which in the Peace Treaty of 1773 (Article I) had received a promise from the French Crown that the latter would not assist (directly or secretly) any nation against her, considered the above arrangements as unfriendly acts and a breach of peace (see Steck, *op. cit.*).

² Steck does not quote Justi in his essay but he is familiar with his writings. See *Abhandlungen aus dem Deutschen Staats- und Lehrrecht* (1757), p. 150.

regard and treat them as sovereign and independent. Steck does not indicate whether the establishment of intercourse amounts to recognition *per facta concludentia*, but if it did so it would certainly mean acknowledgement declaratory in nature.

However, third powers might deny 'recognition', i.e. due treatment to a new State, though the latter had lawfully gained its independence. Steck quotes in this respect the recognition policy of Spain towards the United States, and observes that their non-recognition by Spain would be improper (*ungereimt*). Though he does not say that he would classify it as delictual (tortious), it seems that he regards it as such. Such denial of right would amount in his view to forcing the new State into submission to the former Sovereign (mother State) and violate the natural equality of nations.¹

(3) Steck is more emphatic as to the tortious aspect of premature recognition of a new State by third powers which he considers as intervention in the affairs of the mother State. The term 'premature' refers in principle to the period after declaration and assertion of independence by a new State but before its recognition by the mother State. The new State 'prematurely' recognized by third powers draws no further benefit from such recognition than provisional establishment of intercourse. Should the mother State succeed in re-establishing its sway over the new State, the latter must be considered as non-existent in the law of nations. The question remains what is the legal position of a new State if the mother State is ultimately out of the picture but still denies its recognition. Steck gives no definite answer to this question but one or two of his dicta as quoted above seem to indicate that the period of 'prematureness' of recognition would die a natural death. More light is thrown on this question by later writers such as Martens and Klueber.

Though the term *Erkennung* or *erkennen* is not used consistently by Steck, there is little doubt that what he eliminates as not conceded by the law of nations is recognition as a constructive act. On the other hand, recognition as a declaratory act is superfluous. Acknowledgement of facts by third powers takes place normally by the establishment of intercourse and treaty making. As in Justi solutions are determined by the peculiar eighteenth-century blend of the naturalist and positivist doctrines.

III

The influence of Steck as an active participant in the formulation of problems of recognition was not confined to his immediate contemporaries but extended to a number of prominent lawyers of the late eighteenth and early nineteenth centuries, to mention only Martens and Klueber. More-

¹ See also Puffendorf, *De Jure Naturae et Gentium Libri Octo*, Book VIII, ch. 4, p. 18; and Wolff, *Jus Gentium*, para. 348 (*The Classics of International Law*).

over, it extended indirectly through Klueber to Henry Wheaton and the editors of the posthumous editions of his *Elements of International Law* and thus it is reflected in some of the treatises of the most eminent publicists in the field of international law.

Martens, discussing the case when a nation, or part of it, wishes to drive the Sovereign from the throne, or when part of it endeavours to declare itself independent, distinguishes two points for the consideration of foreign powers: (1) the conduct to be observed towards the old or new Sovereign or towards the people who, after having revolted, declare themselves independent, and (2) the assistance to be given to either party.¹

With regard to the first point, Martens observes that 'a foreign nation, not under any obligation to interfere, does not appear to violate its perfect obligations nor to deviate from the principles of neutrality if, in adhering to the possession² (without examining into its legality) it treats as Sovereign him who is actually on the throne and as an independent nation people who have declared and still maintain themselves independent'.

Martens quotes Steck in support of his statement, and in fact he follows predominantly his reasoning except for a rather more emphatic repudiation of legitimism in its rigid form. The behaviour of third powers towards a new State is, according to Martens, determined by two considerations: (1) the declaration of independence of the people who separated themselves from the mother State, and (2) the *de facto* maintenance of independence. If these two conditions are fulfilled, third powers will have to accept the situation of fact as conclusive for the determination of its legality in the

¹ Martens, *A Compendium of the Law of Nations* (1789) (transl. by Cobbett, 1802), p. 18 et seq.

² Grotius, writing about a usurper in power, states that if he 'is in *possession* the acts of government which he performs may have a binding force arising not from a right possessed by him for no such right exists, but from the fact that one to whom the sovereignty actually belongs . . . would prefer that measures promulgated by him should meanwhile have the force of law, in order to avoid utter confusion which would result from the subversion of laws and suppression of the Courts' (*De Jure Belli ac Pacis*, Book I, ch. 4, para. 15).

More light is thrown on this problem by Puffendorf in his *De Jure Naturae et Gentium Libri Octo* (Book VII, ch. 3, para. 9). He states that if 'a people which either first comes together to form a State or leaving a previous form of State' confers sovereignty on its ruler, the latter 'need not obtain the *consent* or *approval* of other Kings or States . . .'. He states further (Book VII, ch. 8, para. 9) in respect of rulers who invade the sovereignty of legitimate rulers that foreigners 'have no concern in examining the title whereby a man secures sovereignty but merely follow along with the *possession*' ('Ad quos non spectat examinare titulum . . . sed simpliciter possessionem sequuntur').

Vattel considers as the only condition of membership of the natural Society of Nations that the State should be 'really sovereign and independent that is that it govern itself by its own authority and law' (*Droit des Gens*, Book I, ch. 1, para. 4). See also Book IV, ch. 5, para. 68, where Vattel writes: 'When a nation has expelled her sovereign, other powers who do not choose to declare against her, and to risk the consequences of her enmity or open hostility, consider her thenceforward a free and sovereign State without taking on themselves to determine whether she has acted justly in withdrawing from her allegiance to the prince by whom she was governed.' And further: 'Foreign powers take for their rule the circumstances of actual *possession* . . .' (italics added).

law of nations, and will have to treat the new State as sovereign and independent. As to the treatment of a new Sovereign (Government), Martens, similarly to Justi, refers specially to elective Kingdoms and observes that the right to elect the Sovereign belongs to the people. Foreign princes may make recommendations 'but they have no right to interfere authoritatively . . .'. In support Justi's essay is quoted. Martens quotes Poland as an example of an elective monarchy and emphasizes that the interference of foreign powers in the elections of Polish kings has no foundation in the law of nations.

Turning to the second point, i.e. the assistance given by third powers to either of the conflicting parties, Martens writes:

'When once obedience has been formally refused and the refusing party has entered into the possession of the independence demanded, the dispute becomes the same as those which happen between independent States; consequently any foreign prince has a right to lend assistance to the party who he believes has justice on his side, whether he be obliged so to do by treaty, or not; provided, however, that he has not promised to observe a strict neutrality. But, as to espouse an unjust cause is unlawful, and as it is impossible that the opinion of the two parties should not differ with respect to the justice of their cause, it is also impossible that those against whom succours are directed should not consider such a step as a departure from neutrality and as an injury.'

Bringing the tortious aspect of the problem at this stage (assistance) into the picture, Martens states that the party aggrieved, whether mother State or previous Sovereign, has two alternatives. It may either 'dissemble or at most complain of the injury' or it may 'seek retaliation'. Martens adds that 'the conduct that Great Britain observed, particularly towards France, Spain and the Pope after the revolution of 1688, and that which she observed towards several other powers after the colonies of North America declared themselves independent, may serve to illustrate this subject'.

Finally, if the aggrieved party admits defeat, i.e. the mother State acknowledges the independence of the new State or a sovereign renounces his throne, third powers have no more alternative but to accept the situation. They have no right to oppose the revolution and Martens adds significantly: '*Nor is the acknowledgment of its validity necessary.*' In support of this statement Steck is quoted as the only authority on the subject.

Thus Martens follows in principle the views of Justi and Steck.¹ But while Justi admits recognition as a constructive act exceptionally in the case of the rank or title of a ruler derived from the recognizant, Steck and Martens seem not to admit any situation in which such an act could be exercised by third powers. Recognition as a constructive act is not con-

¹ It is interesting to note that Martens, op. cit., quotes several essays of Justi and Steck on various subjects. See pp. 19, 58, 59, 126, 129, 130, 154, 156, 171, 235, 284, 285, 311, 345, 347, 350 and 351. These frequent quotations testify to the importance of both writers at that period.

ceded and as a declaratory act it is in principle superfluous. The legitimization of a new State or Sovereign takes place from within and third powers are bound to act in accordance with facts which determine at the same time the position in internal (municipal) law as well as in the law of nations.

It may be interesting to note that Martens exercised a considerable influence on Robert Ward, one of the earliest historians of the law of nations. Ward is *inter alia* concerned with the assumption of a higher rank or title by a sovereign, a problem discussed previously by Justi. He refers to the conversion of the Duchy of Prussia into a kingdom and states that when in 1701 the Elector of Brandenburg assumed the royal title of King of Prussia, 'the Emperor was prevailed upon to acknowledge him first and the rest of the Princes of Europe were induced to follow his example'. Relying on Martens who followed in this respect Justi's views, Ward underlines that the royal title was not *conferred* by the Emperor but simply acknowledged by him.¹

IV

The position of third powers in relation to new States is similarly formulated by Jean Louis Klueber, though subject to some deviations from the views expressed by earlier writers.² Klueber states that 'Sovereignty is acquired by a State either at its foundation or at the time when it legitimately rids itself of dependence in which it found itself previously.³ To be valid, it needs no recognition or guarantee by any foreign power provided that its possession is not imperfect. However, it may be *prudent*⁴ to have it

¹ Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe* (1795), pp. 410-14.

Ward also discusses generally the Republican form of Government and states that it is in no way inferior to monarchies: 'The sovereignty of every State must be somewhere lodged . . . it matters little, with respect to foreign nations, whether it is possessed by one man, or by many, by hereditary descent or by election.' Discarding principles of hereditary legitimism, Ward turns to the case of a rebelling State and says that its sovereignty must depend on the success of the rebellion. In his discussion of treaties, he refers to the emergence of the Helvetian Republic (Switzerland) in the fourteenth century as an independent State and writes: 'It was through the operation of these treaties (by which the Union of Cantons came to be formed) that the *Swiss Peasantry* erected themselves into independent States; and that from treaties which were afterwards made with them by other powers, their Sovereignty came ultimately to be *acknowledged*.' Ward follows here the views of Steck who had drawn attention to the existence of Swiss independence long before its formal stabilization at the Peace Treaty of Westphalia (see Ward, *op. cit.*, pp. 276, 445).

The formation of a republic had also been discussed by Justi in his essay 'Ob die Nachfolger in der Regierung oder die Erben die Schulden eines verstorbenen Reichs-fürsten zu bezahlen gehalten sind' (*Historische und Juristische Schriften*, p. 129). See also J. W. Textor, *Synopsis of the Law of Nations* (1680), ch. 8; 'Of Republic' (*The Classics of International Law*, ed. by J. B. Scott, 1916).

² Klueber, *Droit des Gens Modernes de l'Europe* (1831).

³ Here Klueber relies also on Moser's view that the question whether people may form a new State depends, according to the law of nations, on whether the old sovereign was able or willing to protect them (see Moser's *Versuch des neuesten Europäischen Völkerrechts* (1778), vol. vii, p. 126 et seq.).

⁴ See *Staatsklugheit* in Justi.

recognised expressly or tacitly and to obtain the guarantee of one or more third powers.' Klueber quotes Steck and Moser in support and draws our attention to numerous examples from State practice. He writes: 'We find examples (of express recognition) in the peace treaty of Munster concluded between Spain and the United Provinces of the Netherlands in 1648, in the peace treaty of Kainardgi of the 10-21 July 1774 (art. 3) and the treaty of Paris of 1783 (art. 1).' The following further examples of express recognition are drawn from the Napoleonic period:

'The recognition of the Kingdom of Westphalia by Russia in the peace treaty of Tilsit, 1807 (arts. 18-20) and by Prussia in the treaty of Tilsit (arts. 6-9); the recognition of the Rhine Confederation by Prussia in the same treaty (art. 4); the recognition of the new Kings of Naples and Holland by Russia and Prussia in the same treaty (arts. 14 and 3); the recognition of the Kingdom and Sovereignty of Bavaria and Wirtemberg as also of Emperor Napoleon as King of Italy by Austria in the treaty of Pressbourg, 1805 (arts. 5, 7, 14). Austria and France recognised the independence of the Helvetian and Batavian Republics in the same treaty (art. 18). In the peace treaty of Vienna, 1809 (art. 15) Austria recognised all changes which had taken place or would take place in Spain, Portugal and Italy. The final act of the Congress of Vienna contains several examples of express recognition in relation to the Kingdoms of Hanover, the Netherlands, and the two Sicilies and Switzerland in arts. 26, 65, 74 and 104.'

As to tacit recognition Klueber quotes: 'The peace treaty of Munster of 1648 (art. 53). See also the final Act of the Congress of Vienna (arts. 1, 6, 17, 53, 65 et seq., 98, 99, 101 and 103).'¹

It is characteristic that these examples which Klueber quotes in support of the view that recognition, though unnecessary for the validity of the legal status of a new State in the law of nations, may be nevertheless granted by third powers as a matter of *prudence*—are drawn from the Napoleonic period as well as from earlier State practice such as the Treaty of Munster or the Treaty of Kainardgi. Klueber defines prudence as 'convenance de la politique' in inter-State relations. It is obvious that he does not conceive recognition as a constructive or constitutive act, whether in relation to the past or to his own period, but views it as a declaratory act dictated by the requirements of political expediency. In distinction to Justi and Steck, Klueber does not limit the normal role of third powers to due *treatment* accorded to new States or sovereigns in accordance with their

¹ As to guarantees Klueber quotes: 'The treaty of alliance between France and Switzerland of 1777 (art. 4). The Treaty concluded in 1778 between France and the United States of America (art. 11). Guarantee of integrity of the States of the Rhine Confederation promised by Russia in the Treaty of Tilsit of 1807 (art. 25). Reciprocal guarantees of the States concerned in the treaty concluded by France with Bavaria, Wirtemberg and the Elector of Baden (reference to Klueber's *Staatsrecht des Rheinbundes*, para. 135). France guaranteed the integrity of the possessions of the House of Austria in the Treaty of Peace of Pressbourg 1805 (art. 17) and in the Treaty of Vienna, 1809 (art. 14).' Finally, Klueber quotes further examples by reference to the Acts of the Congress of Vienna.

lawful rights but finds it also advisable that they should give formal expression to it.¹

As to the tortious aspect of recognition, Klueber distinguishes between the recognition of interim possession and the recognition of definite independence of a people rebelling unlawfully or of a usurper. While the first does not violate the rights of the mother State or the lawful sovereign, the second is in his view an outrage against them and continues to be so as long as they have not renounced their rights or are *presumed* to have done so.² This presumption is a significant step forward. For while in Steck's essay the period of prematurity suffers from indefiniteness, it is in Klueber's view possible to presume that it has come to an end in a particular case if the mother State has definitely lost its sway over the rebelling people. In that case the presumption seems as good as irrebuttable and it would then be a matter of prudence for foreign powers to recognize the new State and acknowledge its legal position.

Before proceeding to a discussion of Wheaton's views on which Klueber exercised a direct influence, one more writer deserves attention, i.e. Friedrich Saalfeld.³ The importance of his opinion lies *inter alia* in a joint discussion of sovereignty and recognition. He observes that 'in order to consider the sovereignty of a State as complete in the Law of Nations, there is no need for its recognition by foreign powers; though the latter may appear useful, the *de facto* existence of sovereignty is sufficient.' Referring further to the problem of legitimacy, Saalfeld states that the way in which sovereignty was acquired by a State has no influence on its recognition by third powers as 'thanks to the perfect independence of States a foreign power is not authorised to judge the legality or illegality of what happens in another State but has to take only facts into consideration. Anyhow recognition of sovereignty given by a third State does not put any restraint on the possible action of the State which intends to question such sovereignty.' In support Saalfeld quotes Martens and Klueber.

Saalfeld repeats the same arguments when he discusses the position of a State which emerged out of a revolution. As to the position of the State which opposes the sovereignty of the new State (mother State), Saalfeld examines the circumstances in which recognition by third States would amount to an offence (*Beleidigung*). In principle such recognition is not yet an offence in itself but the State which feels itself injured does not lose the

¹ Klueber restates his views once more in relation to the position of new sovereigns. He writes: 'The Sovereign, that is to say the reigning person who represents the State, partakes in the independence of the latter. It is for this reason that the legality of this dignity, as far as foreign nations are concerned, does not depend at all on the inauguration of the coronation or on the recognition by foreign States . . .' though it is the usage in Europe (which is not obligatory) to notify foreign powers of the accession of a sovereign to the throne (Klueber, *op. cit.*, p. 80, paras. 48-49).

² Klueber, *op. cit.*, vol. i, para. 23.

³ Saalfeld, *Handbuch des positiven Völkerrechts* (1833), pp. 26, 63.

right to question the sovereignty of the new State. All depends on the fact whether the latter is ultimately established. Saalfeld observes that 'sovereignty is not decisively established if the previous Sovereign still has a footing in the country concerned, if he behaves there as an independent Sovereign, in other words if he still possesses fortified positions and maintains an army in the field'. The period of prematurity is here fairly well defined and affords sufficient guidance for third powers in their relationship to the revolutionary entity.

However, Saalfeld referring to a new instance of State practice, particularly to the Greek revolution, warns the reader of a revival of legitimism accompanied by new principles of intervention. According to these principles armed intervention by third powers in the revolutionary area is admissible if an uprising originated not from the ruler but from the people, if the results of the revolution are condemnable, if the changes are a bad example for the subjects of the intervening State and if the changes constitute a breach of universal peace. Saalfeld observes that, if recognition is judged by the above standards, one has to look not only at facts but also at their 'legitimacy'.

These observations reflect the tentative revival of the conception of legitimism as propounded by the 'Holy Alliance' school of thought after the Napoleonic wars. Authority of inquiring into the legitimacy of changes in the Family of Nations, whether resulting in the creation of new States or governments, appears here as a discretionary power which would enable the existing States to judge new situations by legitimist tests and to approve or disapprove of them irrespective of the compelling force of facts. This is constitutivism with a vengeance, a solution totally different from that proposed by the early positivist writers for the adjustment of political changes. To appreciate the significance of legal developments at this point a brief recapitulation of the views of these writers seems essential.

We have seen that Justi rejected the interference of foreign powers in elective monarchies by equating elective with hereditary rulers. During an interregnum sovereignty, according to him, is vested in the whole State and the problem of change of the Head of State (Government) is the internal problem of its people or its lawful representatives. Recognition does not appear as a medium of legitimating changes from the international point of view.

Steck emphasized, *mutatis mutandis*, the same view in relation to the recognition of new States and reached the conclusion that while third powers should not recognize prematurely, they need not expressly recognize new States after the period of prematurity is over. The legitimist doctrine found here its expression in the preservation of the traditional rights of the mother State. However, these rights were not said to be

preserved at any price, and third powers were allowed to establish intercourse with a new revolutionary State even before its release by the mother State, if possession was effectively asserted. Martens and Klueber followed the same conception and the latter introduced a convenient presumption of termination of prematurity. In all these cases the problem of recognition was formulated in a manner to show that the disturbance of the static legal order, which had prevailed in the past during the period of dynastic legitimism, was not allowed to prevent the reconciliation of new political changes with the tentative principles of a flexible and potentially progressive law. For this purpose a kind of basically revised 'legitimism' extending to all independent nations, irrespective of their form of government, was introduced by a number of writers. It aimed at re-establishing in each particular case the disturbed legal order on new equalitarian conditions without the loss of the principle which made it coherent in the past. Thus the orthodox dogma of immutability of the *inter-dynastic* set up in Europe was gradually abandoned and the creation of a new *international* legal order was tentatively proposed to serve the relations between nations and not dynastic interests. Once immutability ceased to be a taboo, and popular sovereignty started to be an equally compelling fountain of law, new States or heads of States (governments) were capable of deriving their legal status from within this legal source. As the law of nations accepted their legal position side by side with the old European powers whose sovereignty dated back to the pre-Bodin period, there was no immediate need of a doctrine authorizing foreign powers to recognize new States or sovereigns in a constructive manner. Recognition continued to perform its traditional function of acknowledgement of facts accompanied by respect for the consequences which the law of nations attached to them, and it was not necessary for the validity of such acknowledgement to be given by an express act. On the other hand, recognition, in so far as it presented itself as a possible weapon for slowing down modern developments, was not allowed to enter the theoretical framework of the law of nations and this no doubt explains the extreme caution with which its first systematic formulation was attempted.

The writers of the early period of eighteenth-century positivism, whenever faced with the eventuality of recognition as a medium of fitting the new political reality into the law, on the whole rejected such a solution, choosing a solution more consistent with the natural law tradition. Even if the law of nations was conceived as based on the consent of States, this anti-naturalist trend was not yet allowed to extend to the field of recognition. Even Klueber who gives recognition a more prominent place in his treatise, treats it as a matter of prudence, an act which could be hardly considered constructive in nature. Moreover, he extends this interpretation retrospectively to such cases in the distant past as, for instance, the

legitimation of the Netherlands. Saalfeld follows the same line of reasoning; but he draws our attention to the 'Holy Alliance' conception of legitimism which proposed a different solution, one of preservation of the political balance of power created at the Congress of Vienna by combating revolutionary changes with the help of intervention and discretionary denial of recognition. This solution, which he mentions with reference to the Greek revolution, was to authorize the existing powers to examine the legitimacy of a revolutionary change from without. As we have seen, Saalfeld rejects it as inconsistent with the generally accepted conception of sovereignty.

V

It is with these considerations in mind that Henry Wheaton's views on recognition may be briefly examined. Wheaton's treatise on international law has already appeared in its fifteenth edition (thirteen of them posthumous) and it is therefore significant as a work of remarkable continuity.¹ It is also important for the examination of the historical aspect of recognition as Wheaton, in his attempt to formulate the problem of recognition, refers to Klueber who relied on a number of eighteenth-century writers.

The reader of treatises of international law of the nineteenth and twentieth centuries must be struck by the fact that many of their authors referring to Wheaton's views on recognition, confine themselves to quotations from his posthumous editions. There is rarely any reference to the first edition of his *Elements of International Law* which, however, is the most illustrative for the theory of recognition in its early formative stage.

Discussing the problem of sovereignty, Wheaton writes in his first edition: 'Sovereignty is acquired by a State either at the origin of the civil Society of which it consists or when it separates itself lawfully from the community of which it previously formed a part and on which it was dependent.' Here Wheaton quotes Klueber in support.²

However, he deviates from Klueber's views when he refers to the formation of a new State by revolutionary change: 'If the revolution in a State be effected by a province or colony shaking off its sovereignty, so long as the independence of the new State is not *acknowledged* by other powers, it may seem doubtful, in an international point of view, whether its sovereignty

¹ The first great systematic works on international law originating from the common law world were written by James Kent and Henry Wheaton. However, Kent's work (started in 1826) was a general Commentary of Law, part of which only was devoted to international law. The problem of recognition is discussed by Kent with reference to revolutionary changes in Europe and America. The principle of defactoism is emphasized in a significant statement: 'Rebellion until it has succeeded is treason; when it is successful it becomes independence; and thus the only real test of independence is final success.' Kent, *Commentary on International Law* (ed. by J. T. Abdy, 1878), p. 88.

² Wheaton, *Elements of International Law* (1836), p. 91 et seq., para. 15.

can be considered as complete however it may be regarded by its own government and citizens.' Though Wheaton suggests here a constitutive theory of recognition, his views on the subject are not yet definite and this follows also from other statements made in the first edition of his treatise.

In a passage on the independence of the Spanish American Republics, he refers to their recognition by the United States and Great Britain 'whilst the parent country (Spain) still continues to withhold her assent' and observes that this example of 'acknowledgment of independence . . . concurs to illustrate the general understanding of nations that where a revolted province or colony has declared and shown its ability to maintain its independence, the recognition of its sovereignty by other foreign States is a question of policy and *prudence* only'.¹ This is entirely Klueber's language and the passage by itself might convey the *prima facie* impression that Klueber is not alien to his views.

In another passage Wheaton refers to the independence of Switzerland and the Netherlands who 'so long levied war, concluded peace, contracted alliances and performed every act of sovereignty before their independence was finally acknowledged—that of the first by the German Empire and that of the latter by Spain'. These examples, Wheaton believes—'go far to show the general sense of mankind on this subject'. The general sense of mankind—similarly to prudence—reveals itself through the establishment of intercourse by third powers with new States before their formal release by the mother State.

Finally, Wheaton turns to the problem of American independence in his *Elements of International Law* as well as in his *Histoire des Progrès du Droit des Gens en Europe* published in 1841.² In the latter he refers to the treaties concluded by France with the United States before their recognition by Great Britain and explains the way in which the French Court tried to justify its policy. In particular, French action in relation to the United States was based on the fact that 'they were in possession of independence when the treaties of alliance and commerce were concluded on 6 February 1778 and that according to undisputed principles of public law this fact was sufficient for the (French) King to enter the above treaties without examining the *legality* of their independence'.³

Thus in the light of arguments brought forward in both his treatises Wheaton seems confronted with two solutions relating to recognition: one

¹ Wheaton, op. cit.

² p. 395 et seq.

³ Wheaton adds that it had not been the task of the French Court to examine whether the United States had or had not the right to throw off English sovereignty; whether their independence was legal or not. Neither the law of nations, nor treaties, nor morality, nor politics imposed on the King of France a duty to be the guardian of the allegiance of English subjects to their Sovereign. It was enough that the colonies formed by their population and territory a considerable nation, established their independence, not only by a solemn declaration but also by asserting it against English efforts.

based on legitimist doctrine, the other on principles of defactoism. He rejects the first together with the corresponding theory of recognition of an interventionist type. Referring to the alliance of Russia, Austria, Prussia, Great Britain and France (the latter since the Congress of Aix-la-Chapelle, 1818) he writes:

'This union was intended to form a perpetual system of intervention among European States, adopted to prevent any such change in the internal forms of their respective governments as might endanger the existence of the monarchical institutions which had been re-established under the legitimate dynasties of their respective reigning houses. The general right of interference was sometimes defined so as to be applicable to every case of popular revolution, where the change in the form of government did not proceed from the voluntary concession of the reigning Sovereign.'

It extended also to every revolutionary movement which these powers considered dangerous to 'the social order of Europe'. Wheaton refers here with approval to the policy of the British Government which considered the alliance only as one for the liberation of Europe from the military dominance of France. It did not contemplate further intervention: 'It never was . . . intended as a union for the government of the world, or for the superintendence of the internal affairs of other States.'¹

The second solution which presented itself logically to Wheaton was the defactoist one as propounded by the writers whom he quotes and whose terminology he adopts. This solution had been followed in American State practice since Jefferson—to recall his well-known statement that 'it accords with our principles to acknowledge any government to be rightful which is formed by the will of the nation substantially declared'. This statement gives expression to the doctrine of defactoism in its purest form and it was no doubt applied by the United States to the South American Republics in the early decades of the nineteenth century.²

However, Wheaton seems to lean towards a third solution when he expresses his doubt whether sovereignty of a new State can be completed without recognition by third powers. This solution reverts to constitutivism though divorced from principles of legitimism. Wheaton gives full expression to this theory in his third edition of *Elements of International Law* published in Leipzig where he writes that while *de facto* independence of a State is sufficient to establish *internal* sovereignty, its *external* sovereignty 'may require *recognition* of other States in order to render it perfect and complete'.³ The matter is no more one of doubt as it was in the first edition. Wheaton now splits sovereignty into internal and external. The *de facto*

¹ Wheaton, *op. cit.*, pp. 114-17.

² Goebel Jr., *The Recognition Policy of the United States* (in *Studies in History, Economics and Public Law* (1915), vol. lxvi).

³ Wheaton, *Elements of International Law* (1848) (repeated in Dana's ed., 1866, Part I, paras. 20-27).

independence of a State no longer determines its external position in the law of nations but is confined in its consequences to the internal sphere. As the external sovereignty of a State is not *derived* from within, it calls for action from without which must be taken by the existing Member States of the Family of Nations. Wheaton considers their recognition as essential for the participation of a new State in all the advantages of the Society of Nations. It is recognition (not acknowledgement) which renders the sovereignty of a new State perfect and complete.

Without going into the reasons which made Wheaton adopt this new solution, it may not be irrelevant to recall what the editor of one of the posthumous editions of his treatise observes in this respect. He draws attention to the fact that it was after the publication of the first two editions that the influence of Bentham, Savigny, Heffter and, above all, of Hegel made itself strongly felt in the sphere of legal doctrine.¹ Hegel derives the legal existence of a new State from the will of the existing powers.² Their consent is not only at the basis of international law as such, it also determines membership in the Family of Nations.³ This constituted a deviation from the views of the earlier positivists who did not envisage an extension of the theory of consent of States to the field of recognition of States and governments. The sovereignty of a new State or the legal position of the Head of State or Government was in their view totally determined from within with full validity in the external sphere. The Hegelian school combined positivism with constitutivism and abandoned the pure defactoist basis of sovereignty and recognition. Wheaton, seemingly under the impact of these trends, abandons the conception of homogeneous sovereignty, divides it into internal and external and makes the latter dependent on the consent of States.

However, this division does not seem to eliminate entirely the defactoist tradition. Though external sovereignty is no more self-constitutive within a new State but depends on recognition by foreign powers, its internal sovereignty is still a matter of factual formation and not of legitimacy which, in Wheaton's view, is not the concern of the recognizing powers.

VI

The purpose of this inquiry is not to engage in a discussion of further developments in the nineteenth and twentieth centuries. Our considera-

¹ Wheaton, *Elements of International Law* (ed. by Wilson, *The Classics of International Law*, p. 14a).

² Hegel, *Werke* (1854), vol. viii, part iii, para. 331. See also Sir Hersch Lauterpacht, *Recognition in International Law* (1948), p. 38.

³ Nussbaum, *A Concise History of the Law of Nations* (1954), p. 237, observes: 'Hegel opens the door to intervention by arguing that a State cannot be indifferent to what is going on internally in another State (more precisely, such internal developments may justify denial of recognition to that State).' See also the general observations made by Goebel Jr., *op. cit.*

tions were confined to the early historical aspect of recognition and their purpose was to draw the attention of historians of international law to the first monographic attempts in this field. It has been shown that the need for sorting out State practice in the field of recognition and for ascertaining certain principles presented itself during the period of the gradual decline of dynastic legitimism. With the occurrence of frequent changes in membership of the Family of Nations and with the appearance of new forms of government and the corresponding conflicts between new State and mother State or between Sovereign and Sovereign (Government), third powers started looking for legal guidance and recognition came to claim a separate chapter in treatises of international law which it did not enjoy in the works of the great classic writers of the late naturalist and earlier positivist period. It is at this turning-point that the first monographs on the subject appear. With legitimism struggling for its preservation in Europe, several solutions presented themselves in a tentative way. We have drawn attention to what Justi and Steck proposed in their essays. Martens studied both of them and thus their views were reflected in one of the most outstanding treatises of the law of nations. The Napoleonic period had much to add to the volume of State practice in the field of recognition. Napoleon obtained recognition from the dynastic powers on the continent of Europe for his policy of creating new States and Sovereigns and we find in Klueber a writer facing squarely the lessons of the period. Klueber, relying on Steck, still follows the defactoist principle though he introduces an element of 'convenance de la politique' and advocates the stabilization of political situations by express or tacit recognition, unlike his predecessors who considered the establishment of intercourse as a sufficient medium for normalizing the relations of the existing powers with new States or governments. Wheaton is not only faced with the pre- and immediate post-Napoleonic material but examines also the policy of Great Britain and the United States applied to the Spanish-South American conflict. Like his predecessors he is anti-legitimist but he is also reluctant to follow the defactoist doctrine in its entirety. After the publication of the first edition of his *Elements of International Law* Wheaton, influenced by Hegelian ideology, is faced with a new possible solution. In his third edition he adheres to this new solution and adopts a constitutive theory of recognition.

Our attention has also been drawn to the tortious aspect of recognition. The most important problem in this respect is that of prematureness of recognition of a new State or Sovereign (Government) in violation of the rights of the mother State or the previous Sovereign. The term 'prematureness' in relation to a new State meant in conditions of legitimism the period preceding its recognition by the mother State. Steck tears himself away from this conception of prematureness but not without difficulty. Anyhow,

he admits intercourse between a rebel State and third powers dictated by the circumstances of each particular case. In the view of later writers such as Martens and Klueber the period of prematurity is significantly shortened and third powers do not run the risk of committing a delict by acknowledging the independence of a new State if the mother State has lost its grip over the former, even prior to the recognition of the new State by the mother State. This tortious aspect of recognition remains part and parcel of our notions of international law whether in relation to premature recognition of States or governments and it testifies to the potentialities of the legal character of recognition.

There was, however, another and perhaps more significant aspect of the delictual character of recognition emphasized by eighteenth-century writers, i.e. that arising out of unlawful denial of recognition of new States or Heads of States by foreign powers. Justi speaking about denial to an elective ruler of recognition of his title or rank derived not from foreign powers but from his predecessors in power, considers such non-recognition as a delict which entitles the injured ruler to proceed to mutual non-recognition by way of reprisals. Moser speaks about the duty of recognition of a new elective ruler in terms similar to those in Justi's essay. But, as already pointed out, it is important to remember that in the view of the early positivist writers the duty of recognition of new States or rulers (Governments) by foreign powers lies in the acknowledgement of situations of fact and the respect for the significance and for the consequences which the law ascribes to them. In this sense their writings contain no doubt the rudiments of a legal theory of recognition. Steck, discussing the recognition policy of Spain in relation to the United States of America at the close of the eighteenth century, goes so far as to say that non-recognition would amount to forcing the new State into submission to the former mother State and violates the natural right of States to equality. This peculiar tortious aspect of recognition loses some of its original significance in the treatises of early nineteenth-century writers. A discussion of the legal theory of recognition and its possible co-existence with the constitutive theory in subsequent literature and State practice would be beyond the scope of our considerations.¹ Equally outside their scope is the discussion of other aspects of recognition such as recognition of belligerency or the distinction between *de facto* and *de jure* recognition as revealed in Canning's recognition policy in South America.²

A better understanding of the early formative stage of the theory of recognition called for a survey of the views of the first comparatively unknown monographers on the subject, whose impact on the writers of

¹ For a discussion of this problem see Lauterpacht, *op. cit.*

² Temperley, *The Foreign Policy of Canning* (1925), p. 143.

the generally known treatises should not escape the attention of historians of international law. Without having exhausted the list of the former or the latter, an attempt has been made to examine the different solutions which suggested themselves in the period of great political and ideological changes. Whether the theory of recognition has since outgrown its formative stage if viewed in a wider perspective may still seem doubtful. State practice and the divergent views of writers present up to our day a confusing picture out of which no satisfactory measure of common opinion seems capable of emerging. In a way the theory of recognition seems still to be *in fieri*.

PROBLEMS OF AUSTRALIAN COASTAL JURISDICTION

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INTRODUCTION¹

THE emergence of the Commonwealth of Australia to prominence in international affairs has led to a rapid accumulation of local experience on some of the major and most controversial aspects of international law. In some respects this experience has been unique, especially in those instances where there is interaction of norms of international and of constitutional law. The international lawyer in a federal society, unlike his counterpart in a unitary, is obliged to consider not merely the extent and limitation of the international competence of his Government but the associated question, which of two governments, Federal or State, is constitutionally entitled to exercise jurisdiction. Concepts of international law sometimes have a catalytic effect upon the distribution of power between central and local governments, and the unravelling of the consequent complexities is often illuminating to the jurisprudence of each system and constitutes a fascinating field of inquiry. The interaction of international and constitutional law is most clearly illustrated in Australian maritime jurisdiction, especially in the sphere of fisheries which are a matter of some moment in both Commonwealth and State politics.

The Constitution gives the Commonwealth power over 'fisheries in Australian waters beyond territorial limits'² impliedly reserving to the States power over fisheries within these limits. It is not clear exactly what is meant by the expression 'territorial limits'.³ It would seem logical to distribute the fishery power according to the proprietary rights of the competing Federal and State governments, but it is doubtful if the founders of the Australian Federal Constitution in 1900 thought of the matter in precisely these terms. They probably had in mind the responsibility of the Federal Government internationally, and since in fishery matters such responsibility is of a different character in relation to the territorial sea from what it is in relation to the high seas they may have intended to exclude

¹ Acknowledgement is made to the Colonial Office, Librarian, Australia House, the Attorneys-General of the Australian States and the Departments of Marine, Harbours and Fisheries, and the Director of Naval Intelligence for making available their files.

² 63 & 64 Vict. c. 12, s. 51 (x).

³ Goldie's article on the 'Australian Continental Shelf' begs this question by translating 'territorial waters' as 'territorial waters': *International and Comparative Law Quarterly*, 3 (1954), p. 546.

Federal jurisdiction altogether from the former. Practice over the past half century has been based on the assumption that the expression 'territorial limits' designates the territorial—high-seas boundary, but it is not so settled as to be beyond challenge, and it may be that further investigation will show it to be ill-founded. On a plain construction of the Constitution it seems proper to conclude that 'territorial limits' means either the limits of the Commonwealth or those of the States, in other words, an actual physical boundary. This construction is certainly reinforced by the history of the expression 'territorial limits' which will subsequently be examined. The question then is to determine what is the boundary. It may be that the maritime boundary of the Commonwealth is the outer rim of territorial waters while that of the States is the low-water mark. In this case the territorial sea may be Federal territory, though whether or not the Federal Parliament has fishery competence within it depends on whether it is the Federal or State limits that are implied in the expression 'territorial limits'. If the former, then the boundary between exclusive State fishery jurisdiction and Federal jurisdiction is the outer rim of the territorial sea; if the latter, it is the boundary between that sea and 'inland water'.

The questions thus posed in determining whether the grant of power over fisheries in the territorial sea is to the Commonwealth or the States cannot be answered without introducing norms of international law. What is the juridical character of territorial waters? Are they in international law as much a part of the national territory as dry land? If they are, then it might be concluded that they are within the 'territorial limits' of Australia. Whether the 'territorial limits' of Australia are coterminous with those of the States, in other words, whether the State maritime boundaries embrace the territorial sea, is another question, the answer to which depends on what rights international law attributed to the Australian colonies before federation, and what rights the Imperial Parliament in the legislation defining the colonial boundaries is deemed to have asserted. An investigation into the juridical character of specific territorial waters necessarily proceeds in two stages: first, what is the nature of the State's interest in these waters in the eyes of international law; secondly, what interest has in fact been asserted by the State in constitutional law? If the territorial waters of the Crown colonies in the nineteenth century were Crown land in every sense of the term their outer rim remained the State boundary after federation, or in other words the State 'territorial limits'. On the other hand, if the low-water mark was the colonial boundary it continued to be the State boundary after federation, and any further interest attributed to Australia in its territorial sea must be deemed to have accrued to the Commonwealth.

Part I of this paper is devoted to discussing the question whether it is the Commonwealth or the State parliaments which are exclusively competent to legislate for fisheries in Australian territorial waters. The question cannot be answered without discussing the juridical character of territorial waters generally, and the conclusions arrived at will be instructive to lawyers in other federal maritime States where analogous questions have arisen or are likely to arise.¹ In no federal State has the problem of distribution of competence between central and local governments in territorial waters been completely solved. The tidelands dispute, so called, in the United States is but the prototype of controversies that are endemic in federal organizations. The issue might arise over oil exploitation of the seabed or over fisheries, but it will certainly arise whenever the federal and constituent elements of the community find themselves in economic competition in marginal waters. In Australia there are three possible solutions. First, that territorial waters are Commonwealth Crown lands; secondly, that they are State Crown lands; thirdly, that they are subject to no proprietary interest whatever but only to jurisdictional rights exercised according to their distribution under the Constitution. If they are Commonwealth Crown lands then a host of consequences follows, not the least of which may be the application to the territorial belt of Commonwealth fishery legislation.

The issue as it presents itself to an Australian lawyer may be briefly stated. The famous *Franconia* case, *R. v. Keyn*, decided that British Crown land terminates with the low-water mark and that British legislatures exercise over the territorial sea no more than limited jurisdiction not amounting to actual 'possession' or 'occupation' of the area so as to include it within the national boundary. The Territorial Waters Jurisdiction Act, 1878, did not reverse this decision but merely extended criminal jurisdiction to aliens. The proposition that the low-water mark is the 'limit' of British territory can only be rebutted by establishing that *R. v. Keyn* was wrongly decided, or that since then international law has allowed for the acquisition of the territorial belt and that this has in fact been acquired. It is significant for the purposes of the present paper that *R. v. Keyn* is supported by decisions of other national courts of more recent date, though apparently not by the International Law Commission and the opinions of jurists. In the case of Australia it seems from the decisions and opinions later to be analysed that the low-water mark was the 'territorial limits' of the colonies, and that as subordinate legislatures they exercised extra-territorial jurisdiction only over the adjacent territorial sea. Beyond the three-mile limit they had no competence whatever, and the practice arose for them to limit their fishery jurisdiction to the three-mile belt. High-sea jurisdiction was

¹ In the draft constitution of the Federation of the West Indies the problem is minimized by employing the expression 'territorial waters' in place of 'territorial limits'.

reserved to the Imperial Parliament, and after 1885 also to the Federal Council of Australasia, the antecedent of the Commonwealth. When the colonies federated in 1900 the practice continued unquestioned of the States legislating for fisheries in territorial waters. The Commonwealth refrained from enacting fishery legislation until 1952, and hence did not enter into potential competition with the States in this respect. Only in unimportant and isolated instances did the question of State interest in the territorial belt arise. That question is still open.

In Part II of the paper the question of Australian bays will be discussed. It is clear that inside the closing line of a bay, by which the boundary between inland waters and the territorial sea is defined, the States' interest is exclusive, and the seabed is State Crown land. The Australian coast is one of considerable complexity, and there are some bays, like the gulfs of South Australia, which are extensive in area and at the same time of economic significance to the State. It is in the latter's interest that the closing line of bays be drawn at the maximum limit, irrespective of whether the State interest also extends to embrace the territorial sea beyond. It is equally in its interest that a base line for territorial waters should be drawn so as to attribute to the State the sea within the line, and the question whether the State or the Federal Government, or neither, is competent to do this within the limits allowed by international law is a matter of interest to any constitutional lawyer.

In Part III the questions posed in the previous two parts will be applied to the particular question of the Great Barrier Reef. Here the geographical situation is complicated with interlocking areas of islands, cays, reefs and shoals. The criteria for enclosing the internal waters of archipelagos, which by definition are State territory, and distinguishing them from high seas, which are subject to Commonwealth fishery legislation, and from territorial waters, which are a matter of disputed jurisdiction, are by no means settled either in international law or in Australian practice. A fisherman operating within a complex of reefs might find himself subject from moment to moment to different legal systems according to his movement in and out of the contorted boundary of Commonwealth and State jurisdictions. It would be difficult for him precisely to know his rights and duties, and, indeed, these would only be clarified after a prosecution and a determination as to the criteria for fixing the base line in archipelagos. The problem is by no means academic as experience in the policing of Queensland fishery legislation indicates.

In the course of this paper it will be necessary to examine Australian practice in a number of areas of interest to international lawyers. Australia's view on the extent and delimitation of territorial waters has been consistent. Commonwealth ministers have disclaimed competence over aliens fishing

on the high seas. For the benefit of readers unfamiliar with Australian law it should be mentioned that the Australian States, but not the Commonwealth, have preserved unqualified their colonial incompetence to legislate for things and persons outside their own territory. This incompetence was removed for the Dominions by the Statute of Westminster,¹ but from the provisions of this enactment the Australian States were excluded. It is very doubtful if they are competent to legislate for fisheries outside their own territorial boundaries, and if it is decided that the State boundary is the low-water mark it would very likely follow that the States have no fishery competence beyond inland waters. This matter will be discussed below in Part IV. Whether it would be economic to promote fishery development, legislate for it and enforce the laws in rivers and mangrove swamps alone remains to be seen. On the other hand, the problem of determining the exact point of intersection of Commonwealth and State jurisdictional boundaries makes it questionable whether the co-existence of two competing fishery régimes is desirable. Since no clear answer to most of the questions posed in this paper is yet possible one can only suggest that a court faced with them will ultimately decide the issue on grounds of policy. One policy would be to preserve in the interests of harmony the present practice based on the assumption that the State jurisdiction is exclusive in the territorial sea and the Commonwealth exclusive on the high seas. A second would be to exclude the States from the territorial sea in the interests of a general Commonwealth paramountcy and those of legal certainty. The United States Supreme Court in the tidelands cases based their decisions less on precedent than on high policy, and views on policy will differ according to the prevalence on the bench of federalist or unionist opinions.

I. TERRITORIAL WATERS OF AUSTRALIA—COMMONWEALTH OR STATE?

(I) TERRITORIAL WATERS AND THE MARITIME BOUNDARY OF BRITISH DOMINIONS

A. *The problem of R. v. Keyn*

If English law in 1900 drew the seaward boundary of the Australian colonies at the low-water mark this remained their 'territorial limits' after federation. Territorial waters, if properly forming a part of the territory of Australia today, would then seem to be territory of the Commonwealth not of the States. In fact, the law as declared in *R. v. Keyn* in 1876 seems to have fixed the low-water mark as the seaward boundary of the realm.

¹ 22 Geo. V, c. 4. At the time the State authorities resisted the application to them of the provisions of the Statute: *Parl. Pap.* (1929-30), vol. 16 (Cmd. 3479), p. 194.

(i) *The Decision in R. v. Keyn*

The great English jurists of the seventeenth and eighteenth centuries, Coke, Hale, Selden and Blackstone¹ attributed to the King not only a jurisdiction over the seas adjoining the coasts of England but also a property right in the waters and the seabed beneath. The latter was taken to be as much a part of the realm as the dry land itself. Echoes of this doctrine persisted into the nineteenth century in the works of Chitty² and Hall,³ but by 1800 the Crown's traditional claims had in fact been abandoned,⁴ and the new doctrine of territorial waters had been substituted for them.⁵ The

¹ Coke: 'If a man be upon the sea of England, he is within the kingdom or realme of England': Co. Lit. 260b; Hale: 'The narrow sea, adjoining to the coast of England, is part of the waste and demesnes and dominions of the King of England, whether it lie within the body of any county or not': *De Jure Maris*, c. 4 (in Hargrave's *Law Tracts* (1787), pp. 10 and 18). Selden said 'the King of England hath a double right—viz. a right of jurisdiction which he ordinarily exerciseth by his Admiral, and a right of property or ownership': *De Mare Clausum*, lib. 2, cc. 22 and 24. Hale (or the tract ascribed to him) cites actual grants of land under the sea: grant of Canute *de terra insulae Thanet, tam in terra quam in mari et littore*; and William I, *Abbati Sancti Augustini de tota terra Estanore, et totum litus usque medietam aquae*; Blackstone, Comm. I, 110: 'The main or high seas are part of the realm of England.' Callis on Sewers, p. 53, disputes whether the subject may by grant or prescription have the grounds of the sea further than low-water mark. Horn in *Le Miroir des Justices*, c. 111, c. 1300, referred to the King's 'sovereign seignure extending to middle of sea surrounding land'. Hale at first adopted this view (Moore, *History of the Foreshore* (3rd ed., 1888), p. 362), but abandoned it in favour of Selden's. Molloy also followed Selden (1676): *De Jure Maritime et Navali*, extract in Crocker, *The Extent of the Marginal Sea* (1919), p. 297. Also Welwood, *Abridgement of All Sea Laws* (1613); Malynes, *Consuetudo vel Lex Mercatoria* (1656); Boroughs, *Imperium Maris Britannici* (1686).

² *Prerogatives of the Crown* (1820), pp. 142, 206: 'The King has an undoubted sovereignty and jurisdiction, which he has immemorially exercised through the medium of the Admiralty Courts, over the British seas. . . . The law of nations and the constitution of the country have clothed the Sovereign with this power, that he may defend his people and protect their commercial interests. By implication of law the property in the soil under these public waters is also in the King'; *A Treatise on the Laws of Commerce, &c.* (1824), p. 102, where Selden is defended.

³ *Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm* (2nd ed., 1875), pp. 1–2. 'This dominion and ownership over the British seas, vested by our law in the King, is not confined to the mere usufruct of the water, and the maritime jurisdiction, but it includes the very fundum or soil at the bottom of the sea.' See also Schultes, *Essay on Aquatic Rights* (1811), p. 109; Angell, *A Treatise on the Right of Property in Tide Waters, and in the Soil and Shores Thereof* (1826), p. 18; Woolrych, *A Treatise on the Law of Waters and of Sewers, including the Law Relating to Rights in the Sea* (1830), p. 19.

⁴ Fulton has been unable to find any assertion of the common law doctrine later than Charles II: *The Sovereignty of the Sea* (1911), p. 577. Bynkershoek admitted that large parts of the sea are susceptible of appropriation, but contended that in 1703 there was no actual exercise of dominion: *De Dominio Maris*, c. 4.

⁵ In 1760 the High Court of Admiralty held that a French vessel taken by an English privateer at Hayti was not good prize as it had been taken within cannon range of a Spanish port: Marsden, *Report of Cases Determined by the High Court of Admiralty*, p. 175. Thereafter the cannon-shot rule gained currency in British practice (*Treaty between United States and Great Britain* (1794); Wheaton, *Elements of International Law* (1864), p. 724), and matured into the three-mile doctrine. For pre-1800 treaties see Riesenfeld, *Protection of Coastal Fisheries under International Law* (1942), pp. 129 et seq. See the peace negotiations with the United States at Ghent in 1814 and the subsequent fisheries disputes leading to the Treaty of 1818 in which three miles emerged as the criterion: *Parl. Pap.*, North America, No. 1 (1878); Wheaton, op. cit., p. 324; *Parl. Pap.*, Canada (1888), p. 70. Also the fishery dispute with France leading to the Convention of 1839: Fulton, op. cit., pp. 604–11; Smith, *Great Britain and the Law of Nations* (1935), vol. ii, p. 144. By the time the Australian colonies were founded three miles might be taken as the accepted

process was to be explained not as a shrinkage of the Crown's rights to a three-mile marginal belt,¹ but rather as a dereliction of those rights followed by the exercise of such jurisdiction over the territorial sea as international law permitted. It cannot be said that by 1800 international law had adopted any definite rules as to the nature or extent of territorial waters. Three miles, subsequently explained as representing roughly the limit of effective gunfire from the shore, was taken to be the most satisfactory formula by both Great Britain and the United States at the close of the eighteenth century, and this formula was adopted in *The Twee Gebroeders*.² Following this case it was taken for granted that the realm of England extended to the outer edge of the territorial belt. In *The Leda*,³ for example, Dr. Lushington asked: 'What are the limits of the United Kingdom? The only answer I can conceive to that question is the land of the United Kingdom and three miles from the shore.'⁴

It could not be denied that after 1800 international law sanctioned an exercise of at least some of the incidents of sovereignty over an area of waters contiguous to the shores of England. Whether this jurisdiction amounted to absolute dominion, constituting the waters and the soil beneath them part of the realm of England and the property of the Crown, was, however, another matter.⁵ There was no clear evidence that international law admitted a property right in territorial waters, and even if it did that did not necessarily alter English law. The correctness of Dr. Lushington's⁶ view that the Crown's dominion ended not at the low-water

limit of British territorial waters. See letter of Canning to Polignac of 19 November 1824, F.O. 27/323: 'According to the acknowledged Law of Nations, no country can claim more than one Marine league off her own coasts by any other Title than Concession': Smith, *op. cit.*, p. 146. See also the opinion of Law Officers of 9 November 1818, F.O. 83/2266—quoting Bynkershoek and fixing range of cannon at three miles, quoting *The Anna* (*infra*): *ibid.*, p. 156, and the report of Dodson Q.A., in *The Petit Fûles* dispute, F.O. 83/22: *ibid.*, p. 165.

¹ Although Meadows approached the question by way of reading down England's claims: *Dominion and Sovereignty of the Seas* (1689), quoted extensively in the eighteenth century. Fulton's argument may be accepted: *op. cit.*, p. 538.

² (1800) 3 Ch. Rob. 162.

³ (1856) (Swab.) Adm. 40.

⁴ *Blundell v. Catterall* (1821), 5 B. & Ald. 268; *Benest v. Pipon* (1829), 1 Knapp 60; *Officers of State v. Smith* (1846), 8 Sess. Cas. 711, *affd*; *Smith v. Stair*, 6 Bell's Appeal Cases, 487; *A.G. v. Chambers* (1854), 4 De G.M. & G. 206. See also *Free Fishers of Whitstable v. Gann* (1865), 11 H.L.C. 192, where Sir William Earle said: 'the soil of the sea-shore to the extent of three miles from the beach is vested in the Crown'—quoted with approval by Lord Chelmsford in the House of Lords. See *Foreman v. Same*, L.R. 4 H.L. 266; *Duchess of Sutherland v. Watson* (1868), 6 Sess. Cas. 199 at p. 213; *Gammell v. Commissioners of Woods* (1859), 3 Macq. App. Cas. 419 at p. 453. On the other hand, in *General Iron Screw Co. v. Schurmanns*, 1 J. & H. 180, jurisdiction over three miles was limited to certain purposes only. In the *Forty-Nine Casks of Brandy* (1836), 3 Hagg. Adm. 257 at p. 290 Sir John Nicholl said: 'No person ever heard of a land jurisdiction of the body of a county which extended to three miles from the coast.'

⁵ The distinction between *dominium* and *imperium* was asserted by Grotius, *De Jure Belli ac Pacis*, lib. ii, c. ii, s. 4.

⁶ It is arguable that in 1800 the conception of territorial waters was limited to neutrality (*The Anna* (1805), 5 Ch. Rob. 373), *Yale Law Journal*, 56 (1947), p. 360, and was extended by analogy to embrace fisheries. If this argument is sound it would be difficult to justify the view that

mark, but one marine league therefrom, was thus open to question, and was in fact challenged in *R. v. Keyn*¹ in 1876. The issue was deemed so important that it was put before the Court of Crown Cases Reserved composed of no less than thirteen Judges.² The circumstances giving rise to the case were as follows. The commander of a foreign ship, the *Franconia*, was indicted for manslaughter before the Central Criminal Court arising from the loss of life on a British ship which was run down and sunk by the *Franconia* within three miles of the Port of Dover. He was himself a German national and his ship was on a voyage to a foreign country and merely passing through English territorial waters at the time of the collision. The court would have had jurisdiction (a) if the act had occurred within the body of a county of England, or (b) if it fell within the historical jurisdiction of the Lord High Admiral. It was held by a majority of one that the court lacked jurisdiction.

There has been considerable controversy as to what exactly the case decided. Keith has gaily dismissed the decision as 'unsound'.³ Elsewhere it has been considered as limited to a determination of the jurisdiction of the Lord High Admiral and to have avoided any decision on the extent of the territory of England.⁴ A close study of the case will disclose that its scope cannot be narrowed down in this fashion. The Court of Oyer and Terminer historically took cognizance of offences committed in the body of a county, the Court of the Lord High Admiral those on the sea. Each court claimed concurrent jurisdiction over inland waters. By statute the Admiral's jurisdiction came to be exercised by the Central Criminal Court. It was not disputed that had the defendant in *R. v. Keyn* been a British national the Court would have had jurisdiction. It would also have had jurisdiction if the offence had been committed within the body of a county. The question whether territorial waters were within the body of a county was thus placed directly in issue, and the discussion of the jurisdiction of the Lord High Admiral followed only upon a determination that they were outside the realm.⁵ Of the minority Judges only four decided that the waters in question were subject to the Crown's *dominium*, and they based themselves largely on quotations from Hale and Coke, and on the pronouncements of Lord Stowell and Dr. Lushington, which were in turn either *obiter dicta* or based on the *dicta* of Hale and Coke. Grove J. argued

jurisdiction over territorial waters amounted in the early nineteenth century to full sovereignty. This view is fortified by the extreme flexibility of the supposed maritime boundary. Even Lord Stowell did not adhere consistently to the three-mile rule but later resorted to the cannon shot rule which at that time may have amounted to much the same thing, but is a much more relative criterion.

¹ (1876), 2 Ex. D. 63.

² A fourteenth died during the hearing.

³ *The Dominions as Sovereign States* (1938), p. 383.

⁴ *Secretary of State for India v. Chellikani Rama Rao*, [1916] L.R. Ind. App. 199.

⁵ It was in fact admitted that the Admiral's jurisdiction did not extend to foreigners.

that the Crown's dominion existed as a diminution of Selden's and Hale's more extensive claims;¹ Coleridge C.J.,² on the other hand, argued that international law admits *dominium* of territorial waters along with sovereign jurisdiction upon them, and that this concession from international law had been accepted by England without limitation. Evidence of this extension of British sovereignty he claimed to discover in provisions of the merchant shipping³ legislation as well as the decisions of courts arrived at for the 'reason of the thing'. Amphlett J.A. adopted the same argument and concluded: 'the assumption by the legislature⁴ and in judicial decisions that the three mile zone is English territory ought, perhaps, to be binding upon us in an English court of justice without more.'⁵ The difficulty with this argument lay precisely in the validity of the assumption. Although most international lawyers⁶ had accepted that territorial waters were part of the national territory and included within the national boundary, the

¹ At p. 109.

² At p. 152.

³ 17 & 18 Vict. c. 104, s. 527.

⁴ 59 Geo. III, c. 38, s. 2.

⁵ Cf. Brett J.A. at p. 134: 'A right of sovereignty which gives a right of legislation, in order to protect the rights of property and to ensure the individual safety of all, even strangers, against offence of every kind, is, I think, as complete a sovereign right as any nation has on land.'

⁶ Pufendorf, *De jure Naturae et Gentium* (Carnegie Classics of International Law), p. 564; Bynkershoek, op. cit.; Moser, *Grundsätze des jetzt-üblichen europäischen Völkerrechts in Friedenszeiten* (1750), p. 345; Surland, *Grundsätze des europäischen Seerechts* (1750), ss. 483, 564; Vattel, *Le Droit des gens* (1758), Bk. I, ss. 287-95; Hubner, *De la saisie des bâtiments neutres* (1759), vol. i, p. 57; Valin, *Nouveau Commentaire sur l'ordonnance de la marine du mois d'août* (1760), p. 640; Lampredi, *Juris Publici Universalis sive Juris Naturae et Gentium Theoremata* (2nd ed., 1828), pp. 180, 183; Toze, *La Liberté de la navigation et du commerce des nations neutres pendant la guerre* (1780), p. 23; Galiani, *Dei Doveri dei Principi Neutrali* (1782, 2nd ed., 1942), p. 321; Gunther, *Europäisches Völkerrecht in Friedenszeiten* (1787), vol. ii, p. 53; Martens, *Précis du droit des gens moderne de l'Europe* (Eng. trans. 1802), pp. 159, 168; Nau, *Grundsätze des Völkerseerechts* (1802), p. 101; Boucher, *Institution du droit maritime* (1803), p. 46; Rayneval, *Institutions du droit de la nature et des gens* (1803), p. 161; Azuni, *Droit maritime de l'Europe* (1805, Eng. trans. 1806), vol. i, pp. 186, 224; Jouffroy, *Le Droit des gens maritime universel* (1806), pp. 23, 27; Schmalz, *Das europäische Völkerrecht* (1817), pp. 140-1; Schmelzing, *Systematischer Grundriß des praktischen europäischen Völkerrechts* (1818), vol. ii, p. 12; Klüber, *Droit des gens moderne de l'Europe* (1819), p. 199; Bello, *Principios de Derecho de Gentes* (1832), p. 31; Saalfeld, *Handbuch des positiven Völkerrechts* (1833), p. 93; Wheaton, op. cit., p. 142; Lucchesi-Palli, *Principii di diritto pubblico marittimo* (1840, Fr. trans. 1842), p. 34; Heffter, *Das europäische Völkerrecht der Gegenwart* (1844), p. 131; Masse, *Le Droit commercial dans ses rapports avec le droit des gens* (1844), vol. 1, p. 111; Hautefeuille, *Des Droits et des devoirs des nations neutres en temps de guerre maritime* (1848), pp. 231-2; Riquelme, *Elementos de Derecho Público Internacional* (1849), vol. i, pp. 23, 209; Polson, *Principles of the Law of Nations* (1853), p. 34; Phillimore, *Commentaries upon International Law* (1854), vol. i, pp. 210, 212; Cussy, *Phases et causes célèbres du droit maritime des nations* (1856), vol. i (trans. in Crocker, op. cit., p. 48); Gardner, *Institutes of International Law* (1860), pp. 21, 402; Cauchy, *Le Droit maritime international* (1862) (trans. in Crocker, op. cit., p. 41); Oppenheim, *System des Völkerrechts* (1866) (trans. in Crocker, op. cit., p. 336); Pomeroy, *Lectures on International Law in Time of Peace* (1866, ed. of 1886), pp. 176, 190; Bon, *Istituzioni del Diritto Pubblico Internazionale* (1868), pp. 79, 83; Carnazza-Amari, *Trattato sul diritto internazionale pubblico di pace* (1875) (trans. in Crocker, op. cit., pp. 36, 38); Casanova, *Del Diritto Internazionale* (3rd ed., 1876), pp. 116, 127; Field, *Outlines of an International Code* (1876), pp. 14, 15, 21; Bluntschli, *Das moderne Völkerrecht der zivilisierten Staaten* (3rd ed., 1878), p. 185.

matter was not altogether beyond controversy in 1876.¹ And even if international law admitted *imperium* and/or *dominium* as well as jurisdiction in territorial waters, it was questionable whether the above-mentioned legislation constituted an extension of the Crown's domain, or anything more than the exercise of a limited regulatory control. The judicial decisions invoked by the minority were of no great weight since they were not arrived at by any sort of historical or analytical examination, and many of them, such as *The Twee Gebroeders*, could be explained away as dealing only with the neutrality limit.

The most cogent opinions in the case are those of two of the majority Judges, Sir Robert Phillimore and Cockburn C.J., who came to the conclusion that jurisdiction over territorial waters is different from that over 'ports' and over land because its purpose is different. In the one case there is a *jus transitus*, in the other there is not. Jurisdiction over territorial waters is derived from the necessities of defence and security and does not, therefore, of its nature imply a right of property. Phillimore J. agreed with Cockburn C.J., who critically examined the historical material, that notwithstanding what had been said by the text-writers who followed Hale, there was a total absence of precedent to support the doctrine that the realm of England extended beyond the low-water mark. Cockburn C.J., in reply to the argument that *dominium* of territorial waters was a survival of the ancient doctrine of the sovereignty of the seas, asked when and how it was confined to within three miles of the coast:²

'To what, after all' [he went on] 'do these ancient authorities amount? Of what avail are they towards establishing that the soil in the three mile zone is part of the territorial domain of the Crown? These assertions of sovereignty were manifestly based on the doctrine that the narrow seas are part of the realm of England. But that doctrine is now exploded. . . . It thus appearing that the littoral sea beyond low water mark did not, as distinguished from the rest of the high seas, originally form part of the territory of the realm, the question again presents itself, when and how did it become so? Can a portion of that which was before high sea have been converted into British territory, without any action on the part of the British Government or legislature—by the mere assertions of writers on public law—or even by the assent of other nations?'³

Lush J. summarized the argument by saying: 'What was out of the realm then is out of the realm now.'⁴ In addition, Phillimore doubted the power of Parliament to legislate for territorial waters so as to bind other nations.⁵

¹ Writers opposed to treating territorial waters as part of national territory were Ortolan, *Règles internationales et diplomatie de la mer* (2nd ed., 1853), vol. i, p. 349; Creasy, *First Platform of International Law* (1876), p. 234.

² At p. 176.

³ At p. 202.

⁵ At p. 82.

⁴ At. p. 239.

(ii) *The Territorial Waters Jurisdiction Act, 1878*

R. v. Keyn thus clearly decided, though by a narrow majority, that the territory of England ends at the low-water mark and that the jurisdiction of the Admiral which begins at that point did not, historically, embrace foreign nationals. To avoid the embarrassment of not being able to exercise police control over foreigners in British territorial waters, Parliament intervened and in 1878 enacted the Territorial Waters Jurisdiction Act.¹ Keith² comments that the Act rendered *R. v. Keyn* innocuous, but this is by no means the case. It merely covered the gap in the Admiral's jurisdiction; it did not enlarge or purport to declare the law as to the juridical character of British territorial waters.³ After the decision in *R. v. Keyn*, legislation, or at least an executive act, would have been necessary to appropriate to the Crown territorial waters and the seabed beneath them. The 1878 Act merely recited that jurisdiction had always existed over territorial waters, which were defined as any part of the open sea within a marine league of the shore, and then proceeded to declare any offence in territorial waters to be within the jurisdiction of the Admiral.⁴ It was expressed to apply to all the Queen's dominions. There is no justification for the conclusion drawn in Halsbury⁵ from section 7 of the Act that 'the soil of the sea between low water mark and so far out to sea as is deemed by international law to be within the territorial sovereignty of the Crown, is claimed as the property of the Crown although outside the realm'. Cockburn C.J., with whom the other majority Judges agreed, expressly stated that 'realm' and 'territory' are synonymous,⁶ and the suggested distinction between the two on which the Halsbury discussion is based is inherited from Hale and Bacon.⁷ In *A.-G. for British Columbia v. A.-G. for Canada*⁸ Lord Haldane debated the true ratio decidendi of *R. v. Keyn* with Sir Robert Finlay, K.C. The argument is not reported with the case, but Lord Haldane's view was that *R. v. Keyn* decided that the Crown had no right of property in the three-mile limit. Sir Robert Finlay, who contended that the question of property in the *solum* was not in issue, pointed out that in any event Parliament had 'filled the gap'. Lord Haldane replied: 'Not as to property. Parliament is most anxious to take care not to assert any right of property.' In *Harris v. Owners of Franconia*,⁹ which arose out of the same incident as *R. v. Keyn*, Coleridge C.J. said: 'The majority of the Judges in *R. v. Keyn* were of

¹ 41 & 42 Vict. c. 73.

² *The Dominions as Sovereign States* (1938), p. 383, following *Imperial Unity and the Dominions* (1916), p. 129.

³ Coulson and Forbes on *The Law of Waters* (6th ed., 1952), p. 6.

⁴ *Chung Chi Cheung v. R.*, [1939] A.C. 160.

⁵ *Laws of England*, 2nd ed., vol. xxxiii, p. 520.

⁶ At p. 197.

⁸ [1914] A.C. 153.

⁷ Abr. tit. Pr. B. 5.

⁹ [1877] 2 C.P.D. 173 at p. 177.

opinion that the territory stopped at low water mark.' In *D. v. Commissioner of Taxes*,¹ later to be discussed, Philp J. said that the 1878 Act extends the jurisdiction of the Crown over waters but does not make them part of the territory of the United Kingdom or of a Dominion: 'The 1878 Act did not make waters part of the territory of Australia, quite apart from England. . . . Queensland is holding its territory by grant of the Imperial Parliament, and that grant limits both the area as well as the legislative competence.'

That Parliament avoided any extension of the Crown's domain in any of its territories is evident from the speech of the Lord Chancellor when he introduced the Bill in the House of Lords.² He said it was understood that *R. v. Keyn* decided that criminal jurisdiction over foreigners ended at the low-water mark, and that thereafter the Admiral exercised jurisdiction over the high seas, but not over foreigners thereon. The Act was intended to regulate this position. It is true that the Chancellor's words are consistent with the opinion that *R. v. Keyn* had been wrongly decided, inasmuch as international law does confer *dominium* as well as jurisdiction over territorial waters, but it is clear that only one of the two consequences of the decision was to be neutralized by the Act, and the grounds of the decision were not to be reversed.³ Any dispute about those grounds must be deemed to have been settled in *Blackpool Pier Co. v. Fylde Union*,⁴ where Coleridge C.J. and Grove J., two of the minority Judges in *R. v. Keyn*, dealt with the question whether the plaintiffs should be rated to poor relief in respect of that portion of the Blackpool Pier situated below low-water mark. The Poor Law Amendment Act, 1868, section 27, enacted that every extra-parochial place should for all parochial purposes be incorporated in the nearest parish, and every excretion from the sea, whether or not artificial, and the part of the seashore to low-water mark, should be likewise annexed. It was held that the pier which extended 500 feet beyond low-water mark was outside the realm of England and a place wholly beyond jurisdiction. Furthermore, the Law Officers had no doubts about the matter. In an opinion on an

¹ [1941] Q.S.R. 218.

² Hansard, *Parl. Deb.* (1878), s. 3, 237, c. 1605; *Parl. Pap.*, No. 56 of 1878.

³ See United Kingdom Reply in the *Anglo-Norwegian Fisheries* case, *Pleadings, Oral Arguments, Documents*, vol. ii, p. 418 where it is stated that the preamble to the Act has no operative force; the first paragraph of section 5 is merely designed to preserve any rights of jurisdiction vested in the Crown under international law or otherwise. 'Section 7 falls into two parts: First, the definition says that territorial waters means such part of the sea adjacent to the coast as is deemed by international law to be within the territorial sovereignty of Her Majesty. The second part fixes three miles for the purpose of the criminal jurisdiction conferred on the Court by the Act. It is the last part of the definition which, together with Section 2, is really the operative provision and the question may be asked why this operative part was so carefully limited to one particular form of jurisdiction. The explanation lies in the fact that it was uncertain at that time whether three miles would remain the limit under international law, and, indeed, whether the policy of Her Majesty's Government would be to advocate the retention of a three-mile limit or to urge a wider limit. So the legislature carefully limited the Act to the precise purpose for which it was enacted.'

⁴ (1877) 36 L.T. 251.

Order in Council providing for jurisdiction over British subjects in western Polynesia they said¹ on 1 March 1877 that *R. v. Keyn* appeared to decide that 'the sea washing the shores of a State to the distance of three miles is not part of such State',² and on 16 March 1877 'That the case of the *Franconia* seems to us to place limits upon the exercise of any jurisdiction on board foreign ships below low water mark, and to shew a distinction between land and the sea below low water mark, though within the three mile zone.'³ And in relation to the application to the Gold Coast of section 432 of the Merchant Shipping Act, 1854, they said:⁴ 'Since the case of *R. v. Keyn* and the Territorial Waters Act, 1878, the United Kingdom must be held to terminate at low water mark.'⁵

(iii) *The Correctness of R. v. Keyn. The Juridical Character of Territorial Waters in International and in Constitutional Law*

If the Act of 1878 did not, therefore, alter the implications of *R. v. Keyn* as to the juridical character of British territorial waters, the case stands as authority for the proposition that the seaward boundary of the Crown's dominion in the colonies as in the United Kingdom is the low-water mark. Subsequent courts might well refuse to follow the decision but, to be consistent, would have to prove that international law did in 1876 admit a right of sovereignty in territorial waters, and that in so far as the case decided to the contrary it was wrong—or that international law has subsequently come to admit a right of sovereignty; and also that by legislative act or executive practice the Crown has extended its seaward boundary to embrace the three-mile limit.⁶ It cannot automatically be concluded from the admission in international law of sovereignty over the territorial sea that

¹ Holker, Giffard, Deane.

² *C.O. Law Officers' Opinions*, vol. iii, No. 121.

³ *C.O. Law Officers' Opinions*, vol. iii, No. 129.

⁴ Herschell, Smith.

⁵ *C.O. Law Officers' Opinions*, vol. iii, No. 262A. See also Hurst in this *Year Book* 3 (1922-3), p. 46; and *ibid.* 4 (1923-4), p. 34.

⁶ The question is controversial even today. Writers subsequent to *R. v. Keyn* who appear to argue that the national boundary includes territorial waters are: Woolsey, *Introduction to the Study of International Law* (6th ed., 1892), pp. 68, 69, 74; Fiore, *Nouveau Droit international public* (2nd Fr. ed., 1885), ss. 801, 805; Martens, *Völkerrecht — Das internationale Recht der zivilisierten Nationen* (1883), vol. i, p. 378; Negrin, *Tratado de Derecho Internacional Marítimo* (2nd ed., 1883), p. 63; Twiss, *The Law of Nations* (2nd ed., 1884), pp. 295-6; Pradier-Fodéré, *Traité de droit international public européen et américain* (1885), ss. 619, 627; Testa, *Le Droit public international maritime* (Fr. trans. 1886), p. 72; Levi, *International Law* (1887), p. 90; Nuger, *Des Droits de l'état sur la mer territoriale* (1887), pp. 119, 160; Piedelièvre, *Précis de droit international public ou droit des gens* (1894), vol. i, pp. 323, 335; Walker, *A Manual of Public International Law* (1895), pp. 26, 37; Heilborn, *Das System des Völkerrechts* (1896), pp. 41, 43, 55; Stockton, *Manual of International Law* (1898), p. 15; *Outlines of International Law* (1914), p. 112; Davis, *The Elements of International Law* (1900), pp. 55, 57; Gould, *A Treatise on the Law of Nations* (3rd ed., 1900), pp. 3, 4; Gareis, *Institutionen des Völkerrechts* (2nd ed., 1901), pp. 72, 85; Taylor, *A Treatise on International Public Law* (1901), pp. 263, 293; Olivart, *Tratado de Derecho Internacional Público* (4th ed., 1903), vol. i, pp. 203, 204; Hall, *A Treatise on International Law* (1904), pp. 100, 152-3; Westlake, *International Law* (1904), p. 184; Ullmann, *Völkerrecht* (2nd ed., 1908), p. 290; Fulton, *op. cit.*, pp. 537, 696; Hershey, *The Essentials of International Public Law* (1912), pp. 173, 195; Nys, *Le Droit international* (1912), vol. i, 558; Suarez, *Tratado de Derecho*

the latter is assimilated in every juridical respect to dry land. Civil lawyers have in the past two centuries emancipated the concept of sovereignty from the notion of property.¹ The State as an abstract entity is conceived to exercise a plenary power called *imperium* without necessarily enjoying *dominium* over the asset concerned so as to reduce it to its 'patrimony'. This distinction between *imperium* and *dominium* is an elusive one to common lawyers but it lies at the basis of much continental jurisprudence on the territorial sea, and prompts a cautious attitude in the analysis of State practice where 'sovereignty' is asserted over the marginal belt. In *Gasparroni's* case² the Tribunale at Trani in 1952 discussed the distinction between 'territory' and 'sovereignty' in a prosecution taken against some fishermen for dragging for dumped munitions on the seabed.³ It was alleged by the prosecution that the munitions had been granted exclusively to a concessionaire of the Italian Government. As the prosecution was for theft it was necessary to establish property in the seabed and things on it. The Court said that the territorial sea is undoubtedly part of the 'territory' of the State but it is not part of the public domain or the *beni patrimoniali*. There is no exclusive property in it, but on the contrary it must be characterized as *res communis omnium* because all may resort to it and exploit it except as regulated by the coastal State, which alone possessed in respect

Internacional Público (1916), vol. i, p. 173; Kohler, *Grundlagen des Völkerrechts* (1918), p. 105; Gemma, *Appunti di diritto internazionale* (1923), pp. 185, 187; Hatschek, *Völkerrecht* (1923), pp. 190, 208; Lawrence, *The Principles of International Law* (1923), pp. 136-8; Moller, *International Law in Peace and War* (1925), Part I, pp. 148, 149; Dupuis in *Recueil des cours de l'Académie de droit international*, 1 (1924), p. 162; Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), p. 63; Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926), pp. 202, 210; Waldkirch, *Das Völkerrecht in seinen Grundzügen dargestellt* (1926), pp. 105, 109; Jessup, *The Law of Territorial Waters* (1927), p. 116; Bustamante y Sirven, *La mer territoriale* (Fr. trans., 1930), p. 158; Sonderquist, *Droit international maritime suédois* (1930), pp. 61, 95; Gidel, *Le droit international de la mer* (1932), vol. iii, pp. 154, 168, 331; Hold-Ferneck, *Lehrbuch des Völkerrechts* (1932), vol. ii, p. 62; Baldoni, in *Recueil des cours de l'Académie de droit international*, 65 (1933), p. 200; François, *ibid.* 66 (1938), p. 47; Fedozzi, *Introduzione al diritto internazionale e parte generale* (2nd ed., 1933), pp. 386, 409; Ursua, *Derecho Internacional Público* (1938), p. 174; Brierly, *The Law of Nations* (3rd ed., 1942), p. 143; Leonard, *International Regulation of Fisheries* (1944), pp. 9-11; Hyde, *International Law* (2nd ed., 1945), vol. i, pp. 461, 467, 468; Kelsen, *General Theory of Law and State* (1945), p. 211; Ballardore Pallieri, *Diritto Internazionale Pubblico* (4th ed., 1946), 379, 403; Borchard in *American Journal of International Law*, 40 (1946), p. 59; Florio, *Il mare territoriale e la sua delimitazione* (1947), p. 38; Ross, *A Textbook of International Law* (1947), p. 139; Starke, *An Introduction to International Law*; Oppenheim-Lauterpacht, *International Law* (7th ed., 1953), p. 415; Schwarzenberger, *International Law* (2nd ed., 1949), vol. i, p. 149; Guggenheim, *Traité de droit international public* (1953), vol. i, p. 388; Delbez, *Manuel de droit international public* (1951), p. 153; Cavaré, *Le Droit international public positif* (1951), p. 497; Smith, *The Law and Custom of the Sea* (1950), p. 33.

¹ Grotius, *De Jure Belli ac Pacis*, lib. ii, c. ii, s. 4. The Reichsgericht held in 1921 that the territorial waters of Germany were outside the national boundary but subject to *Hoheitsrechte* less intensive in character than those over land: *E.R.S.* vol. ii, p. 135. Followed by the *Reichsfinanzhof* in 1930 where the expression *beschränkte Hoheitsrechte* was employed: *Sammlung der Entscheidungen und Gutachten des Reichsfinanzhofes*, vol. 26, p. 271.

² *Rivista dello diritto della navigazione* (1954), vol. ii, p. 88.

³ Italy claims sovereignty over the territorial sea as much as over land and bays of 20 miles: *Codice della Navigazione, R. Decreto*, 30 March 1942—xx, n. 327, Article 2.

of it the incidents of sovereignty. The Italian Government had no property in the dumped munitions which it could pass to the concessionaire. The characterization of the territorial sea as a *res communis omnium* was insisted upon by the Corte di Cassazione in *Donati v. Società Solvay*¹ in which a soda factory pleaded a State licence in defence to an action for polluting fisheries by the discharge of noxious substances. Sovereignty over the sea was explained as a plenary power of jurisdiction and not as an incident of the public domain.

A less theoretical but even more emphatic attitude to the question has been taken by the French courts. The Cour de Cassation in 1918² denied that the jurisdiction exercised by France over its territorial sea amounted even to sovereignty, and this view was followed by other French courts³ including the Tribunal Civil at Brest in *Compagnie Française des Cables Télégraphiques v. Administration Française des Douanes*⁴ where it was held on appeal that territorial waters do not form an integral part of France, with the consequence that there was no right under existing legislation to exact customs dues within the three-mile limit. It is said that the theory that territorial waters are territory of the littoral State is 'a purely doctrinal one and not unanimously admitted'. The Tribunal followed *R. v. Keyn*, which it specifically quoted, in holding that France has only certain rights

¹ *Rivista dello diritto della navigazione* (1943-8), p. 154, esp. at p. 157.

² D.P. 1923, 1, 103. The decision gave rise to disagreement between Lapradelle who had argued that there is only a bundle of servitudes over territorial waters (*Revue de droit international public*, 5 (1898), p. 347) and Gidel, *Droit international de la Mer* (1932), vol. iii, p. 330.

³ *Affaire Thireaut*, S. 1936, 3, 1; *The Vaucelin*, *Annual Digest of Public International Law Cases*, 1931-1932, Case no. 58. Contrast the régime of internal waters as discussed by the Conseil d'État in 1923 in *Ministère des travaux publics et gouverneur général de l'Algérie (Société Piccioli Frères)*, S. 1925, 3, 17.

⁴ *Annual Digest*, 1938-1940, Case no. 48; *Revue de droit international*, 22 (1938), p. 271. Rousseau has added an interesting note and also Aman, *Le Statut de la mer territoriale* (1938) at p. 287. On the theory generally see Perels, *Das internationale öffentliche Seerecht der Gegenwart* (1882), pp. 352, 353; Imbart de Latour, *La mer territoriale* (1889), pp. 8, 19, 175; Calvo, *Le Droit international théorique et pratique* (5th ed., 1896), vol. i, p. 479; Liszt, *Das Völkerrecht* (9th ed., 1913), p. 87; Moye, *Le Droit des gens moderne* (1920), p. 260; Bonde, *Traité élémentaire de droit international public* (1926), pp. 130, 148; Fauchille, *Traité de droit international public* (1922), vol. i, pt. 2, p. 140, who allows a right of conservation; Strupp, *Grundzüge des positiven Völkerrechts* (1928), pp. 83, 101. In *Éléments du droit international public* (2nd ed., 1930), p. 122 he is emphatic that 'la mer territoriale n'est pas une partie du territoire maritime. . . L'Etat riverain n'y exerce ni un dominium, ni un imperium. Il y possède plutôt, par exception au principe de la liberté de la mer, une puissance territoriale restreinte et limitée par les buts différents qu'elle poursuit'; Sibert, *Traité de droit international public* (1951), vol. i, p. 722; apparently Redtslob, *Traité de droit des gens* (1950), p. 156; Sandiford, *Il mare territoriale secondo il diritto positivo italiano* in *Rivista marittima*, 1927, A-V., Misc. B. 25, 2; Cansacchi, *L'occupazione dei mari costieri* (1936); Scelle, *Droit international public* (1944), p. 319, admits that practice does not correspond with this theory; Rousseau, *Droit international public* (1953), p. 433, while admitting sovereignty over territorial waters would not include them within the national boundary. For conflicting views in the Institute of International Law and the International Law Association see *Annuaire de l'Institut de droit international*, vols. 13, p. 329; 32, p. 525; and 35, p. 755, and *Report of the 34th meeting of the Association*, p. 101. Colombos adopts a neutral position; *The International Law of the Sea* (1954), p. 70; see Brief for the State of Texas in opposition to the motion for judgment in *U.S. v. Texas*, No. 13, 1949, Memorandum by C. C. Hyde, p. 12.

limited by the strict requirements of self-preservation. French law thus draws a sharp distinction between the juridical status of inland waters in ports and bays, which are part of the public domain, and that of the territorial sea. The distinction appears to be based on the consideration that without a full right of alienation there is no property, and the territorial sea or part of it cannot be alienated without derogating from the right of all persons to resort to it. Domain implies exclusion, and from the territorial sea there is no exclusion.

The theory which prompts Continental jurisprudence to withdraw the territorial sea from the conception of 'territory' in the fullest sense¹ evokes little response from the common lawyer whose concept of *imperium* is a synthetic one embracing every public competence whether it be coercive or proprietary. The notions of 'territory' and 'public domain' are concomitants of the notion of sovereignty. This is certainly true of the United States where the proposition that territorial waters are part of national 'territory' crystallized over a period of time and was concisely expounded in *Cunard S.S. v. Mellon*² when the Supreme Court comprehended in the one juridical category the three-mile belt, ports, harbours, bays and dry land. The tidelands cases proceeded on the basis that either the Federal or the State governments possessed a proprietary interest in territorial waters. To a common lawyer it is difficult to conceive of 'territory' subject to national sovereignty and yet not 'owned' by the State. No doubt this is because in his system the notion of *imperium* is still rooted in the feudal theory of *dominium*. Ultimately all British land is held of the Crown, and what has not been fee'd to a private individual is Crown land at the Crown's disposition. English law draws no distinction in this respect between dry land, airspace and water. In a sense one can speak intelligently about 'Crown airspace' and 'Crown waters'. It seems an excessive refinement to

¹ In the *Grisbadarna* case a juridical distinction was drawn between territorial waters and parts of the sea surrounded by land: Scott, *Hague Court Reports* (1916), p. 487. On the other hand, see *The David*, *Annual Digest*, 1933-1934, Case no. 52, and *The Costa Rica Packet*; Moore, *International Arbitrations*, vol. v, p. 6, 1948.

² (1923), 262 U.S. 100 at p. 122; *U.S. v. Bevens* (1818), 3 Wheat. 336 at p. 390; *Church v. Hubbard* (1804), 2 Cranch 187 at p. 234. *The Ann*, 1 Fed. Cas. 926; *U.S. v. Smiley*, 27 Fed. Cas. 1132; *Manchester v. Massachusetts* (1891), 139 U.S. 240 at pp. 257-8; *Louisiana v. Mississippi*, (1905), 202 U.S. 1 at p. 52; Moore, *Digest of International Law*, vol. i, s. 145; Ireland in *Louisiana Law Review*, 2 (1940), pp. 267, 268; *Smith v. Maryland* (1855), 18 How. 71 at p. 74; *McCready v. Virginia* (1876), 94 U.S. 391; *Messenger v. Kingsbury*, 158 Cal. 611, 112 Pac. 65 at p. 66; *State v. Ruvido* (1940), 15 A. (2d) 293. See the view of the United States in the report of Dr. Schücking to the Preparatory Committee for the Conference for the Codification of International Law held at The Hague: C. 196, M. 70, 1927, V., p. 68. The term 'sovereignty' was defined in the *Palmas Island* arbitration (*American Journal of International Law*, 22 (1928), p. 867), as 'the legal condition necessary for the inclusion of such possession in the territory of any particular State'. In relation to territorial waters it is used in a letter from the United States to Spain in 1882 (Moore, *Digest of International Law*, vol. i, p. 707); in a Note to Mexico (Hackworth, *Digest of International Law*, vol. i, p. 657); and in the award of Dr. von Martens in *The Costa Rica* (Moore, *International Arbitrations*, vol. v, pp. 494-8 et seq.).

distinguish sovereignty from property merely on the thesis that the property is not exclusive but subject to a right of 'innocent passage'. The seabed of inland waters is still Crown land although at common law there is a common right of fishery. Why there cannot be State property in the seabed of the territorial sea although there is a common right of passage is difficult at least for the common lawyer to comprehend.

In dealing with the problem presented by *R. v. Keyn*, therefore, it seems that one should commence with the assumption that if there is sovereignty over the territorial belt the latter is to be characterized in English law as Crown land. It is difficult to distinguish between the protective or regulatory jurisdiction which is in fact exercised over territorial waters and the incidents of sovereignty. That jurisdiction is in every sense exclusive except for the right of innocent passage which can be quite satisfactorily explained away as something in the nature of a servitude, a right of way, imposed by international law.¹ The State has an exclusive right with respect to fish in its waters² in the sense that it can exclude all persons from fishing there, and it seems to be splitting unnecessary hairs to distinguish this right from one of property even if the fish are likely to escape into the high seas. A man does not cease to own land because the rabbits on it are peripatetic.

It can scarcely be argued now that international law does not allow the coastal State to exercise sovereignty over territorial waters. The French decisions earlier quoted sought to explain away the expression 'sovereignty' as applied to territorial waters in instruments such as the Air Navigation Convention. French tribunals could hardly narrow down the expression today when it has been deliberately adopted with reference to territorial waters by the International Law Commission,³ when its use was challenged in none of the replies to the questionnaire addressed to Members of the United Nations,⁴ and when it was acknowledged in the Final Act of the Geneva Conference on the Law of the Sea⁵ as extending a State's dominion over the dry land out to the limit of the territorial sea.⁶ The adherence of

¹ Of course, the question of nationality of persons born within territorial waters does not fit into the symmetry of any theory: Jessup, *op. cit.*, p. 132; Gregory in *Michigan Law Review*, 2 (1904), p. 333.

² *The Argonaut and Jonas H. French*; Nielsen, *American and British Claims arbitration* (1926), p. 509; *Lipscombe v. Gialourakis* (1931), 101 Fla. 1130; *Fur Seal arbitrations*, I, 56. Problems of private international law relating to collisions and marriage also arise and are discussed by Jessup, *op. cit.*, p. 115 *et seq.*

³ U.N. Docs., Gen. Ass., 11th Sess., Off. Rec., Supp. No. 9 (A/3 159), commentary to C. III, II, I. Art. 1 (1). Also the Report of the Preparatory Committee for the Conference for the Codification of International Law, C. 74. M. 39, 1929 V. 1, pp. 12, 17; C. 230, M. 117, 1930, V., pp. 3, 6; C. 351 (b), M. 145 (b) V.; C. 74, M. 39, 1929, V. 18-21.

⁴ U.N. Docs., Gen. Ass., 10th Sess., Off. Rec., Supp. No. 9 (A/2934); A/CN. 4/Ser. A/1956; A/CN. 4/90/55; Add. 1/55; 2/55; Add. 3/55; 4/55; 5/55; 6/55; A/CN. 4/L. 54/55; A/CN. 4/93/55; A/CN. 4/L. 59, Add. 2/55. Australia abstained from replying because of its pearling dispute with Japan: A/CN. 4/90/Add. 3/55.

⁵ A/Conf. 13/L. 52, Art. 1.

⁶ In the award of the tribunal set up to settle the boundary of Sweden and Norway in 1908 it was said that 'maritime territory is a necessary appurtenance to land territory', which is not the

the British countries to the conventions at Geneva may be taken as tantamount to recognition that their sovereignty embraces territorial waters. And since English law apparently does not conceive of sovereignty *in vacuo*, detached from territory, the conclusion might well be drawn that the national boundary now extends to embrace the territorial belt.

It does not follow, however, that this assimilation of territorial waters to Crown land is retrospective. Even if international law before the end of the last century allowed a State to exercise sovereignty over its marginal belt, evidence would be necessary that the full consequences of this have been admitted into English law. Specific acts of appropriation of the seabed and subsoil had from time to time occurred, but in the light of *R. v. Keyn*, Sir Cecil Hurst¹ and Professor Gidel² went too far in saying that Parliament had by virtue of the Cornwall Submarine Mines Act of 1857 'committed itself to the proposition that the bed of the sea below low water mark is vested in the Crown'. The weight of *R. v. Keyn* as an authority seems to depend on its correctness in assuming that in 1876 international law limited jurisdiction in territorial waters to matters of security and revenue. It is perhaps too late to assess objectively the law as it then stood, but it is pertinent to comment that the Judges, though they devoted much effort to a valuable analysis of the history of jurisdiction over English waters, neglected some of the most important evidence favouring sovereignty over territorial waters. The Select Committee on British Channel Fisheries³ which reported in 1833 stated that it understood that 'one league from the shore at sea is considered to be the territory of the adjoining country'. It was on the basis of this report that the Fishery Convention with France of 1839 was negotiated, in which it is clear that the British Government acted on the assumption that fisheries in the territorial waters are exclusive to the littoral State.⁴ In 1848, under Customs Regulations, the limits of the Port of Dover were declared to extend three miles out to sea. It was stated in the House of Lords⁵ that 'every sovereign State is supreme over all persons and property within its dominions', and it has long been law that the police

equivalent to saying the two are juridically the same: Wilson, *Hague Arbitration Cases*, 103, at p. 121. The International Court in the *Corfu Channel* case (*I.C.J. Reports*, 1949, pp. 4, 26) seems to have assumed that Albania had sovereignty over her territorial waters. What is the implication of Judge (now Lord) McNair's proposition in the *Anglo-Norwegian Fisheries* case that international law automatically attaches maritime territory to land territory (*I.C.J. Reports*, 1951, p. 160)? Does it mean that territorial waters are included as part of England so as to reverse *ab exteriore* the results of *R. v. Keyn*? Fitzmaurice's formula could be so construed: see this *Year Book*, 31 (1954), p. 373. The argument, however, raises prodigious questions of the inter-relationship of the two legal systems. In the *North Atlantic Fisheries* case it was said that territory is coterminous with sovereignty: Scott, *Hague Court Reports* (1916), p. 157.

¹ See this *Year Book* 4 (1923-4), p. 34.

² Op. cit., vol. iii, p. 330, n. 2.

³ *Parl. Pap.* (1833), vol. 14, No. 676, p. 59.

⁴ *British and Foreign State Papers*, vol. 27, p. 983, Art. 3.

⁵ Hansard, *Parl. Deb.*, s. 3, 54, c. 724.

of one country have no jurisdiction even over their own nationals in their own national ships in British territorial waters.¹ But unless *R. v. Keyn* was manifestly wrong, it decided at least for the nineteenth century, which is the significant period in the inquiry which this paper is pursuing, that the seaward boundary of all British territory is the low-water mark.²

B. *The Case of Federal Units of the British Commonwealth: Canada and India*

The question whether the central or the local government 'possesses' the territorial sea is important in any federal society,³ and in most it is unresolved. Put differently, it involves an inquiry into the delimitation of the respective areas of jurisdiction, and the fixing of the State or Provincial maritime boundary either at the shore or the outer rim of the belt. In Canada as in Australia it is important for several reasons: For example, as a rule State or Provincial legislation does not operate beyond the State or Provincial boundary;⁴ secondly, fishery jurisdiction outside territorial waters is commonly Federal and not State or Provincial, and it becomes important to ascertain whether that jurisdiction extends from the shore or only from territorial waters. Other problems emerge with the delimitation of the respective property rights in the seabed of the Federation and of the

¹ Hackworth, *Digest of International Law* (1941), vol. 1, p. 624 et seq.

² The Scottish courts have refused to follow *R. v. Keyn*. In *Lord Advocate v. Clyde Navigation Trustees* (1891), 19 R. 174, the question before the Court was whether the Trustees could dispose of dredgings taken from the river by depositing them in a sea-water loch. The Crown resisted the claim, maintaining its ownership in the bed of the loch, and in the bed of the sea for three miles. Lord Kyllochy said with respect of the nature of the Crown's right in what is now acknowledged to be part of the territory of the kingdom, viz. 'the strip or area of sea within cannon-shot or three miles of the above, is the Crown's right in that strip of sea propriety, like the Crown right in the foreshore and in the land? Or is it only a protectorate for certain purposes, and particularly navigation and fishing? I am of the opinion that the former is the correct view, and that there is no distinction in legal character between the Crown's right in the foreshore in tidal and navigable rivers, and in the bed of the sea within three miles of the shore. In each case it is, of course, a right largely qualified by public uses; but nevertheless it is in my opinion a proprietary right—a right which may be the subject of trespass, and which may be vindicated like other rights of property.' Again, in *Lord Advocate v. Wemyss*, [1900] A.C. 48 at p. 66, Lord Watson expressed the same opinion: 'I see no reason to doubt that, by the law of Scotland the solum underlying the waters of the ocean, whether within the narrow seas, or from the coast outward to the three-mile limit, and also the minerals beneath it, are vested in the Crown.' Halsbury suggests that the Scottish decisions would correctly express the law relating to the territorial waters of the other Crown dominion: *Laws of England* (3rd ed.), p. 454 n. (k). There is no reason why this should be so. The Scottish kings from time immemorial had property in the marginal sea, and differing streams of interpretation in Scotland and the rest of Great Britain are to be expected.

³ For the U.S. tidelands question see below, p. 229. The question is at the speculative stage in the Federal Republic of Germany. In 1921 the *Reichsgericht* held that under Article 2 of the Weimar Constitution Federal territory was to consist of the territories of the States, but that the States' territory did not include territorial waters. The Federal Government exercised over these certain rights of sovereignty but there was no property in them: *Annual Digest*, 1919-1922, Case 63; *E.R.S.*, vol. 56, p. 135.

⁴ *R. v. Delepine* (1897), *Newfoundland Decisions*, p. 378; *The Frederick Gerring* (1897), 27 S.C.R. 271; *The Ship 'North' v. The King* (1907), 37 S.C.R. 385; *Mowat v. McFee* (1880), 5 S.C.R. 66.

individual State or Province. In Canada the exact delimitation of respective fishery jurisdiction has been raised in the courts. In Australia it was longer delayed because only recently has the Commonwealth Government enacted a Fisheries Act¹ to implement its fishery power under the Constitution. The Canadian experience is thus a useful introduction to a consideration of the problem in Australia.

(i) *Canada*

The Canadian courts have never doubted the existence of territorial waters around the Provincial coasts, but whether it is the Dominion, or the Provinces, or either of them, that enjoys proprietary interest in the seabed under such waters is still in issue. The British North America Act conferred power on the Dominion Government to legislate for both inland and ocean fisheries,² but it was held by the Privy Council in *A.-G. for Canada v. A.-G. for Ontario*³ that this did not affect the property of the Provinces in such fisheries as were within their Crown lands. It followed that the terms and conditions under which fisheries belonging to the Provinces might be leased or granted were within the exclusive competence of the Provincial legislatures. The Federal Government's rights were limited to regulation of fishing and did not include ownership of the fishing beds. Following this decision a *modus vivendi* was arrived at between the Dominion and Provincial governments, but this collapsed in 1914 as a consequence of the decision in *A.-G. for British Columbia v. A.-G. for Canada*.⁴

The Privy Council in that case dealt with the question whether a conveyance by the Province to the Dominion of a strip of land adjoining a tidal water-way carried with it property in the fish therein. The decision was carefully limited to inland waters, and the Board refused to decide the question of *dominium* in territorial waters, regarding it as inappropriate that a municipal law tribunal should pronounce incidentally upon a point primarily involving a question of international law. The difficulties of the problem raised by *R. v. Keyn* were briefly commented upon:

"The doctrine of the zone comprised in the three mile limit owes its origin to comparatively modern authorities in public international law. Its meaning is still in controversy. The questions raised thereby affect not only the Empire generally, but also the rights of foreign nations as against the Crown, and of the subjects of the Crown as against other nations in foreign territorial waters. Until the Powers have adequately discussed and agreed on the meaning of the doctrine at a Conference, it is not desirable that any municipal tribunal should pronounce on it. It is not improbable that in connection with the subject of trawling the topic may be examined at such a Conference. Until then the conflict of judicial opinion which arose in *R. v. Keyn* is not likely to be satisfactorily settled, nor is a conclusion likely to be reached on the question whether

¹ No. 8 of 1952.

³ [1898] A.C. 700.

² 30 & 31 Vict. C. 3, s. 91 (12).

⁴ [1914] A.C. 153.

the shore below low water mark to within three miles of the coast forms part of the territory of the Crown or is merely subject to special powers necessary for protective and public purposes. The obscurity of the whole topic is made plain in the judgment of Cockburn C.J. in that case. But apart from these difficulties, there is the decisive consideration that the question is not one which belongs to the domain of municipal law alone.¹

The immediate result of this decision was that the Government of Canada gave notice that as from 1 January 1915 the administration and control of tidal-water fisheries was to be assumed by it. The Attorney-General of Quebec in 1916 submitted to the Executive Council a report that the power to grant exclusive fishing rights in the tidal waters within the territorial limits of the Province of Quebec or bathing its shores belonged to the Government of the Province.² It was resolved to refer the matter for opinion to the Court of King's Bench of the Province. The question for the Court's consideration was framed as follows: 'Has the Government of the Province or any member of the Executive Council of the Province power to grant the exclusive right of fishing, either by means of engines attached to the soil or in any other manner, in the tidal waters of rivers, gulfs, bays, straits or arms of the sea in the Province or bathing its shores to a distance of three miles from the same: (a) between high and low water mark; (b) beyond low water mark, and in the affirmative to what extent?' Archambeault C.J. declined to answer the question on the ground that it would be improper to do so since the Privy Council had avoided it. Cornell J., however, was of the opinion that ownership of the fisheries between low-water mark and the outer line of the three marine miles belongs to the Province of Quebec. Section 109 of the British North America Act, 1867, had designated as Provincial all lands situated in a Province, and

'Even if these were only those fisheries with engines fixed to the soil, they would suffice to constitute the provincial domain from a legal point of view, and to make the same substantial through the profits they may yield. . . . The Crown is the owner of the soil and, consequently, the fisheries there belong to the province. Nevertheless a serious problem arises with reference to the area within the three mile limit. Although there is a controversy with regard to ownership by the Crown, it seems to me more logical to conclude in the affirmative, at least with reference to the profits of the fisheries. The weight of authorities seems to me to be in that sense, notwithstanding the judgment in the case of *R. v. Keyn* where the Judges were, nevertheless, divided.'

He relied partly on the opinion of writers, and partly on the Territorial Waters Jurisdiction Act, which he held, quite wrongly it is submitted, to have 'completely destroyed the effect of *R. v. Keyn*'. He concluded that existing rights in the fisheries, even within the three-mile limit, had belonged to the Province before federation and that the British North America Act

¹ At p. 174.

² *Re Quebec Fisheries* (1917), 35 D.L.R. 1.

had not had the effect of taking them away from it.¹ Lavergne and Trenholme J.J. agreed with him.

Cross J., on the other hand, dissented, firstly, on the ground that fishing is not a right of property, and is unrelated to the ownership of the soil under tidal waters, and, secondly, on the ground that it is only the shore and not the seabed that is included in the Crown domain.² The doctrine of territorial waters is grounded upon the right of self-defence and protection of commerce, navigation and fisheries. 'It is in respect of these rights or subjects that territorial sovereignty is exercised over the bed of the sea under coastal waters, the soil itself being nevertheless regarded as being outside the realm.' It followed that the Dominion Government alone enjoyed rights in respect of territorial waters. Outside the low-water line, in so far as there may be such a thing as title to underlying land, it had passed to the Dominion as an incident of jurisdiction over the classes of subject mentioned. Above low-water mark the beach is available for all purposes for which land so situated can be used, and it is therefore subject to Provincial jurisdiction. 'But as regards the bed or soil outside the line of low tide, this appears to me, to employ a homely illustration, to be like the naked ownership of the bottom of a vessel of which somebody else has the control for all useful purposes.'³

When the matter came before the Privy Council it was decided on the narrow ground of the right of public fishing,⁴ and once more the Board refused to decide the question of property in the soil. 'It is highly inexpedient, in a controversy of a purely municipal character such as the present, to express an opinion on what is really a question of public international law. If their Lordships thought it proper to entertain such a question they would have directed the Home Government to be notified, inasmuch as the point is one which effects the Empire as a whole.'⁵ Accordingly, the Privy Council contented itself with the formula: 'In so far as soil is vested in the Crown in right of the Province, the Government of the Province has exclusive power to grant the right to affix engines to the

¹ At p. 12.

² At p. 26.

³ In an annotation on the case Professor Lefroy not unfairly remarked that the Judges who held that there is a property right in the solum of territorial waters do seem to have rushed in where the Privy Council and the Imperial Parliament feared to tread. He denies that the Act of 1878 asserted a Crown title to the solum (p. 20). One Canadian court has, perhaps in the light of the hesitation of the Privy Council, with some precipitation, asserted that the jurisdiction of Canada over its territorial waters is as 'exclusive and absolute' as if they were 'part of the land': *S.S. May v. The King*, [1931] 3 D.L.R. 15 at p. 20. On the other hand, in *Cushin & Lewis v. The King* (1935), L.R. Ex. C.R. 103, the Canadian Exchequer Court stated that the territorial waters of Canada do not mean the waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion within three marine leagues thereof, suggesting a legal distinction between inland and territorial waters in contrast with the American doctrine: *Cf. Alsos v. Kendall*, 111 Oregon, 359 at p. 369.

⁴ *A.-G. for Canada v. A.-G. for Quebec*, [1921] 1 A.C. 401.

⁵ At p. 431.

solum'; thus leaving open the extent to which the *solum* of territorial waters is vested in the Province.¹

(ii) *India*

The distribution of Union and Provincial (State) powers in the territorial waters of India is not yet clarified. Before the constitutional changes in 1935 territorial waters were, of course, attributed to British India. The Advocate-General and the Standing Counsel to the Government of India delivered an opinion that the British Government possesses territorial jurisdiction over the sea within a zone of three miles from the shores of the mainland of the provinces of Yeh, Tavoy, Mergui and Tennasserim.

'Whatever may be the precise nature of the territorial jurisdiction exercised by a nation over such belt or zone, it is clear that it comprises the right to control or grant exclusive right of fishing therein. . . . The sea and its adjacent soil within the ordinary territorial limits around British India are vested in the Sovereign, but the use of it for the purposes of navigation and fishing belongs to Her subjects *communis juris*, subject to the right of the Crown to appropriate the same. (*R. v. Kestya Raum*. 8 Bom. H.C. Rep. 63; *Baban Mayacha v. Naga Shrivacha* 1 L.R. 2 Bom. 19). We are of opinion that the Government is entitled to grant exclusive right to fishing.'²

This view of the juridical character of Indian territorial waters was affirmed by the Privy Council in *Secretary of State for India v. Chellikani Rama Rao*³ which dealt with a dispute between the Crown and a private person respecting the ownership of certain islands which had formed in the bed of the sea near the mouth of the River Godavari. The Privy Council decided for the Crown on a passage from Lord Hale that Cockburn C.J. in *R. v. Keyn* had repudiated. Hale said of islands 'arising *de novo* in the King's seas' that they are part of the soil of the sea which 'belonged before in point of propriety to the King'. The only doubt, the Board considered, arose from certain 'dicta' in *R. v. Keyn* which suggested that Crown property was bounded by the range and fall of the tide. 'That case had reference on its merits solely to the point as to the limits of Admiralty jurisdiction: Nothing else fell to be there decided. It was marked by an extreme conflict of judicial opinion.' The Privy Council placed more reliance on a decision of Lord Parker (then Parker J.) in *Fitzharding v. Purcell*,⁴ a case dealing with a fishing dispute between the owners of two manors adjoining the Severn where it had been said that 'the bed of the sea, or at any rate for some distance below low water mark, and the beds of tidal

¹ In *A.-G. for Southern Nigeria v. John Holt & Co.*, [1915] A.C. 599 at p. 611, a case dealing with accretion to the foreshore, it was said that it would have been no defence against the claim of the Crown that the foreshore upon the line of inroad had *de facto* been transferred to the Crown as owners of the sea and its bed within territorial limits. Again, no attempt was made to define 'territorial limits'.

² *C.O. Law Officers' Opinions*, vol. v, No. 28a.

³ [1916] L.R. Ind. App. 199.

⁴ [1908] 2 Ch. 139 at p. 166.

navigable rivers, are *prima facie* vested in the Crown'. This case, however, can be explained on the doctrine of inland waters, and the following points may be made about *Chellikani's* case: First, there was no necessity to claim property in the seabed in order to claim ownership of islands within the three-mile limit. In so far as Hale's discussion was based on Selden's theories it has very uncertain relevance to territorial waters. Hale would probably have claimed islands rising ten miles from the coast. The islands at the mouth of the Godavari could be satisfactorily disposed of by an application of Lord Stowell's doctrine of 'natural appendage'.¹ Secondly, *R. v. Keyn* decided much more than a question of Admiralty jurisdiction, and was decisive for the law of England. *Chellikani's* case is thus of uncertain authority on the juridical character of territorial waters, despite the reasoning on which it was founded.

The problem raised by the federal status of India was discussed, but by no means satisfactorily, in *A.M.S.S.V.M. & Co. v. The State of Madras*.² In 1946 the Rajah of Ramnad had leased chank fisheries in Palk's Bay to the applicant, and this was terminated in 1949 by legislation of Madras and an order made under it. It was contended that under the Government of India Act, 1935, 'a provincial legislature may make laws only for the province or any part thereof', and that the Provincial boundary was the low-water mark; and further that Article 297 which states that 'all lands, minerals and other things of value underlying the ocean within the territorial waters of India shall vest in the Union and be held for the purposes of the Union had operated to vest proprietary rights over chanks in the Union'. The Court decided the question on the ground that the Act was with respect to land and not fishing and that it was within the (Provincial) State jurisdiction, but in the process of doing so it held, after citing international publicists, that territorial waters form part of national territory and then assumed that the Provincial boundary was coterminous with the national for purposes of legislative competence over land tenure: 'The territorial waters if they belong to British India, must belong to several littoral States (Provinces) from which the marginal sea takes off.'³ The implications of the Judgment are confusing since the Court spoke of a distinction between title to territorial waters (in the States) and title to the seabed beneath (in the Union under Article 297).⁴

¹ *The Anna* (1805), 5 Ch. Rob. 373.

² *Law Weekly* (1953), p. 889.

³ At p. 902.

⁴ The decision that territorial waters belong to the Provinces has been criticized in the *Indian Year Book of International Affairs* (1953), vol. ii, p. 354, where it is argued that 'the territorial belt under International Law is assigned to littoral Sovereign States, and therefore only States as international persons can have any rights over them. Units of Federal States, it is submitted, do not have international personality, and therefore the territorial waters of a State cannot be divided among them'. Cf. *Annakumar Pillai v. Muthupayal* (1903), 27 Ind. Rep. Mad. Ser. 551, which is, however, best explained on the doctrine of inland waters.

(II) TERRITORIAL WATERS OF AUSTRALIA

(i) *History of the Three-mile Limit in Australia*

It is true that *R. v. Keyn* is not binding upon Australian courts, but inasmuch as there can be only one general criterion for determining the extent of the Crown's domain in the territories of the Crown it is a decision not lightly to be disregarded. If the seaward boundary of the Australian colonies is different from that of the United Kingdom, this could only be in virtue of some particular executive or legislative action. An Australian court would be entitled to traverse any evidence of the appropriation by the Crown of the three-mile limit on the Australian coast but it would, in fact, find little in nineteenth-century practice to differentiate Australian from English doctrine. It would find, in fact, only certain assumptions which the founders of the Federal Constitution took for granted. Quick and Garran¹ in their classic exposition of the Constitution shortly after its enactment set out their view of these assumptions when they wrote: 'by the law of nations the territorial limits of a country are allowed to extend into every part of the open sea one marine league from the coast, measured from the low water mark.' The States, they went on, 'were accordingly allowed to retain the control of fisheries within their territorial limits, whilst the Federal Parliament was assigned jurisdiction over fisheries in Australian waters beyond the three mile limit'. Sir Robert Garran, Commonwealth Solicitor-General, is thus clearly of the opinion that the expression 'territorial limits' in the Constitution means 'territorial limits of the States' and is the equivalent of 'territorial waters'.²

It is perhaps a little surprising to find this opinion so firmly held in the face of *R. v. Keyn*. To explain it however, one has only to examine the history of jurisdiction in Australian territorial waters and put oneself in the position of the advisers to the Australian colonies at the end of the century. Their precedents led them to think in terms of competence and not in terms of territory, and the ambiguity of the notion 'territorial limits' clearly escaped them. The law they administered had been laid down not by the courts but by their predecessors and by the Law Officers in Whitehall, and the key expressions in their opinions were repeated from occasion to occasion. In 1851 the Advocate-General, an officer of the Admiralty, had delivered an opinion to the British Customs on the operation of the hovering legislation. In the course of it he advised that 'it is now generally understood and admitted that the territory of a country within which the rights

¹ *The Annotated Constitution of the Australian Commonwealth* (1901), p. 354.

² *Ibid.*, p. 369. By way of commentary on the validity of the assumption reference may be made to *Adams v. Bay of Islands County*, [1916] N.Z.L.R. 65, where it was accepted without criticism that the Territorial Waters Jurisdiction Act was a recognition of an international law right to the proprietorship of a zone of sea-water, when in fact it was no such thing.

of sovereignty may be exercised extends to a distance of three miles from the shore'. He went on to define this strip as part of the 'territory' of the maritime State. As a result of this opinion the Lords of the Treasury expressed the view that it would be desirable to repeal the existing legislation which authorized seizure beyond 'the limits of territorial jurisdiction'.¹ This opinion was the starting-point of an exposition of doctrine which constituted the law for the colonial advisers. In 1855 the Law Officers, advising on a British Guiana Ordinance, associated jurisdiction with territory. 'We conceive that the colonial legislature cannot legally exercise its jurisdiction beyond its territorial limits—three miles from the shore.'² Here the expression 'territorial limits' first appears, and within these limits there is colonial legislative competence over all persons. Australian courts on several occasions discussed the incompetence of the colonies to legislate 'beyond the boundaries of their territory' in respect of maritime offences.³

There is, in fact, a whole stream of opinions⁴ and decisions⁵ on the subject of colonial extra-territorial legislative incompetence which assume that there is jurisdiction over territorial waters because these are 'intra-territorial'. The identification of jurisdiction with sovereignty was, however, a misconception. Colonial legislatures had competence over territorial waters because they were exercising over them the protective jurisdiction necessary for the 'peace, order and good government' of the colonies, not because the waters were within their boundaries. The doctrine of extra-territorial incompetence which so much exercised the minds of nineteenth-century colonial advisers is one of obscure origin and dimensions and is compounded of policies deriving from considerations of Imperial interest and of international law. Since outside territorial waters Whitehall was responsible for maintaining the freedom of the seas it was politic to restrain the colonies from asserting themselves there. The jurisdiction normally exercised by United Kingdom officials could safely be entrusted to colonial authorities in respect of the three-mile limit but no farther. In time the rule became inconvenient, especially when the residents of one colony committed depredations in the fisheries lying off another. Where British subjects alone were involved it seemed unnecessary for the colonies always to have to call on the Imperial Government for protection. In the cases of Western Australia and Queensland in particular there was occasion for grievance where Singapore fishermen exploited the pearl fisheries off their coasts without restraint beyond territorial waters. To give the Australian colonies machinery to deal with this and similar problems the Federal Council of Australasia⁶ was set up by Imperial Act in 1885 with

¹ The matter is mentioned by Masterson, *Jurisdiction in Marginal Seas* (1929), p. 140 et seq. and 163.

³ See below, p. 250, n. 3.

⁵ See below, p. 250, nn. 3, 4, 5, 6.

² See below, p. 249, n. 2.

⁴ See generally Part IV.

⁶ 48 & 49 Vict., c. 60.

power to legislate with respect to British subjects fishing in 'Australian waters outside the territorial limits of the colonies'. Explaining the purpose of the Council to the Premier of New Zealand in a letter dated 20 May 1885, the Premier of Victoria said that it was to give power to legislate for fisheries outside the territorial waters where at present there was no jurisdiction.¹ The expression 'territorial limits' seems to have been employed because in the Law Officers' opinions and in the decisions of the courts it was already common parlance.

It seems curious that the draftsmen of the Federal Council Constitution did not advert to the implications of *R. v. Keyn* because the Law Officers clearly had them frequently in mind. In an opinion of 18 March 1887, in relation to Western Australian pearling legislation, they said:² 'The actual scope of the existing legislation is doubtful. The expression "territorial limits" in sub-section (3) of section 15 of the Federal Council Act is ambiguous; but we think it better to let the matter rest where it is until questions are raised.'³ Sleeping dogs are apt to arise in time but for the rest of the century they continued to lie quiet. Practice proceeded on the assumption that the colonies had exclusive fishery competence in territorial waters, the Council outside them. This is evident from all the transactions and discussions leading up to the passage of the Western Australian Pearl Shell and Bêche-de-Mer Fisheries (Extra-territorial) Bill⁴ in the Council in 1889. The Law Officers had reported on several occasions against Western Australian competence outside territorial waters⁵ and had advised that colonial legislation was operative only within them. Recourse was had to the machinery of the Federal Council, and in moving the Bill Sir James Lee Steere expressed the assumption that the three-mile zone was Western Australian territory.⁶

The debates in the Conventions preceding the Federation of Australia in 1900 disclose that the fishery power of the Federal Council was adopted word for word without any real examination of its implications. At the Adelaide meeting in 1897⁷ discussion was directed solely to the policy of Federal control of inland fisheries, and no reference was made to territorial waters. At the Sydney meeting⁸ the debate turned on the definition of 'Australian waters'. It was only at Melbourne⁹ that the question of colonial jurisdiction in territorial waters was raised, and it was treated in a casual and an uncritical manner. Mr. Barton moved that the term 'sea fisheries' be used to avoid any ambiguity in the term 'territorial limits'. Objection

¹ *Parl. Pap.* (1885), c. 4481.

³ *C.O. Law Officers' Opinions*, vol. iv, No. 87.

⁵ *W.A. Leg. Coun. Deb.* (1888), 2nd Sess.

⁷ *Off. Rec. of the Nat. Aust. Conv. Deb.*, Adel. 1897, pp. 776-8.

⁸ *Off. Rec. of the Deb. of the Aust. Fed. Conv.*, 2nd sess., Sydney 1897, pp. 1073-4.

⁹ *Ibid.*, 3rd sess., Melb. 1898, pp. 1855-74.

² Webster, Clarke.

⁴ No. 1 of 1889.

⁶ *Fed. Coun. Deb.* (1889), p. 47.

was raised that this might take away the State control of coastal fisheries. It was argued by Sir John Forrest that the practice of the Federal Council was adequate, and that the formula this employed should be retained. Mr. Barton agreed that 'every State has the right to legislate as to its own fisheries, within the territorial limits of three miles'.¹ It is apparent from this that the Convention acted on the assumption that the colonial boundaries embraced the three-mile limit, with the consequence that the seabed of territorial waters would be State Crown land. Grave doubts on the accuracy of the assumption are not lessened by Mr. Barton's discussion of a case 'decided by Lord Cockburn' which seems to be a garbled version of *R. v. Keyn*.

(ii) *Analysis of the Australian Colonial Constitutions*

If the actual exercise of jurisdiction over colonial territorial waters does not establish that these are within the maritime boundary recourse must be had to legislative or executive acts of the United Kingdom to ascertain where the colonial boundaries are to be drawn. There is no mention of territorial waters in any of the definitions of the word 'colony' in Imperial Legislation,² and in the absence of any such general definition the matter becomes one of construction of the legislative and executive acts fixing the boundaries of the colonies. Unless these are to be interpreted as drawing the boundaries one marine league to seaward of the coast it can be argued that the Colonial Boundaries Act, 1895,³ established them at low-water mark.

The instruments defining the limits of the Australian colonies did not mention territorial waters, and in general referred to 'the coast' as the maritime boundary. For example, the Royal Commissions issued to Governor Phillip in 1786 and 1787 defined New South Wales as 'extending from the northern cape or extremity of the coast' to the South Cape.⁴ The instruments by which Queensland and Victoria were erected out of this territory added nothing to the definition.⁵ In fact Queensland was defined as commencing 'on the sea coast at Point Danger',⁶ and when doubts about

¹ *Off. Rec. of the Deb. of the Aust. Fed. Conv.* 3rd sess., Melb. 1898, p. 1857.

² Acts Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 18 (3); Colonial Laws Validity Act, 1865, 28 & 29 Vict. c. 106, s. 2; Colonial Prisoners Removal Act, 1869, 32 & 33 Vict. c. 10, s. 2; Colonial Fortifications Act, 1877, 40 & 41 Vict. c. 23, s. 3; Evidence Act, 1851, 14 & 15 Vict. c. 99, s. 19; Admiralty Offences (Colonial) Act, 1849, 12 & 13 Vict. c. 96, s. 5; Courts (Colonial) Jurisdiction Act, 1874, 37 & 38 Vict. c. 27, s. 2; Australian Courts Acts, 1828, 9 Gov. 4, c. 83; Australian Colonies Act, 1861, 24 & 25 Vict. c. 44, s. 5; Crown Lands Act, 1866, 29 & 30 Vict. c. 62, s. 7. This does not mean, of course, that the colonies never had territorial waters at all. The Straits Settlement and Johore Territorial Waters (Agreements) Act, 1928, is in fact based on the assumption that they have.

³ 58 & 59 Vict. c. 34, s. 1. Cf. *Gavin v. The Queen*, [1956] 3 D.L.R. 547 at p. 556.

⁴ *Historical Records of N.S.W.*, vol. i, pt. 2, p. 24.

⁵ *Historical Records of Australia*, ser. 1, 10, p. 589; 18 & 19 Vict. c. 54.

⁶ Australian Colonies Act, 1861, 61 & 62 Vict. c. 22, s. 3.

the western boundary were settled by correspondence with the Secretary of State mention was made of 'the shores of the Gulf of Carpentaria'.¹ Victoria was described as commencing at 'the mouth' of the Murray River. What interpretation is to be placed on the expressions 'coast' or 'mouth'? Sir John Nicholl defined 'coast' in the *Forty-Nine Casks of Brandy*² as 'not the sea but the land which bounds the sea; it is the limit of land jurisdiction, and of the parishes and manors—bordering on the sea—which are part of the land of the country. This limit, however, and its character, varies according to the state of the tide: When the tide is out, it is land as far as low water mark; between high and low water mark it is treated as *divisio imperium*.' Again, in *Esquimault and Nanaimo Rly. Co. v. Treat*³ it was held that the expression 'coast line' in a statutory conveyance was used to indicate a boundary at high-water mark. It was held in *Mellor v. Walmesley*⁴ that 'sea-shore' means 'that portion of the land adjacent to the sea which is ordinarily and *prima facie* vested in the Crown'. In a Crown solicitor's opinion of 1881 a similar interpretation was placed on the terms 'coast' and 'shore' as used in South Australian proclamations by local bodies. A purely analytical construction of the relevant Statutes would thus appear to fix the maritime boundaries of at least some of the Australian colonies at the high- or low-water mark. An important consideration in this context is that, even after the delimitation of the Queensland maritime boundary, islands within three miles of the coast were still regarded as at the prerogative disposal of the Imperial Government by Letters Patent. A proclamation of 18 July 1879⁵ was made in Queensland giving effect to Letters Patent of 10 October 1878, by which certain islands were attached to Queensland. Doubts having arisen about the validity of the Letters Patent, they were affirmed by Queensland legislation.⁶ At no stage was Imperial legislation enacted, and it was contested in *R. v. Gomez*⁷ in 1880 that a defect in the Letters Patent could be cured by a unilateral extension of its boundary by the colony itself. The Supreme Court held that Possession Island which lies within a mile and a half of the shore had never been within the boundary of New South Wales which formerly had embraced that stretch of coast, and there was no Imperial Act giving the island to Queensland. It was concluded that it had never been taken possession of by the Crown since the boundaries of Queensland had been defined by Act of Parliament and could only be altered by Parliament. On appeal to the Full Court it was held that the Crown had a prerogative right to alter colonial boundaries, but there was

¹ *Queensland Votes and Proceedings*, 1862, pp. 229–31; sess. 1, 1863.

² (1836) 3 Hag. Adm. 257 at p. 275.

³ (1919) 121 L.T. 657 at p. 658.

⁴ [1905] 2 Ch. 164 for Stirling L.J. at p. 179. See also *Massachusetts v. New York*, [1926] 271 U.S. 65 at p. 92.

⁵ *Queensland Gazette*, 21 July 1879.

⁶ Queensland Coast Islands Act, 1879, 43 Vict., No. 1.

⁷ *Q. Crim. R.*, 1860–1907, 119.

no dissent from the decision of the Judge of first instance that neither the New South Wales nor the Queensland boundary originally included islands within the three-mile limit.

If this is so, it may be difficult to ascribe the territorial waters to the colonies. As Sir Robert Jenkyns said:¹ 'Boundaries are determined or altered by Order in Council, or Letters Patent under the Great Seal of the United Kingdom, and are sometimes fixed by or under the direct authority of an Imperial Act. Where an Imperial Act has expressly defined the boundaries of a Colony or has bestowed a constitution on a colony within certain boundaries, territory cannot be annexed to that colony so as to be completely fused with it.' The problem was discussed in his dissenting Judgment by Philp J. in *D. v. Commissioner of Taxes*.² The case related to the operation of the Income Tax Assessment Act of Queensland, which defines assessable income as 'all income derived directly or indirectly in or from sources in the State'. The appellant resided in New South Wales and held a master mariner's certificate of that State and a Queensland pilot's licence. He was remunerated from pilotage fees which were collected and paid to him by persons duly appointed under Statute by the Marine Board of Queensland. All vessels piloted by the appellant, who was engaged and paid by secretaries resident in Sydney, were foreign, and in the course of the voyage which extended 1,360 miles he travelled 230 miles within one league of the coast of Queensland. In 1937-8 he was assessed for State income tax on the basis that 25 per cent. of his total income was derived directly or indirectly from sources in Queensland. The assessment was upheld by the Supreme Court. Douglas J. decided the question on a technical construction of the income tax legislation, and was careful to point out that his decision involved no assumptions with respect to dominion over territorial waters.³ He disagreed with Webb C.J.⁴ that the Privy Council in *Chellikani*'s case had settled this question for Australia 'no matter what private views we may entertain as to the strength and effect of the judgments in *R. v. Keyn*'.

Philp J.'s general argument was one of statutory construction, but it was

¹ *British Rule and Jurisdiction beyond the Seas* (1902).

² [1941] Q.S.R. 218.

³ He followed *Commissioner of Taxation v. Cairi* (1936), S.R. (N.S.W.) 544 where income tax legislation was held to apply to revenue derived from fishing partly inside and partly outside territorial waters, on the ground that there was sufficient territorial connexion between the source of revenue and the peace, order and good government of the State.

⁴ He also referred to Lord Shaw's apparent approval in *Croft v. Dunphy*, [1933] A.C. 156, of the opinion of Lord Kyllachy in *Lord Advocate v. Clyde Navigation Trustees* (1891), 19 R. 174. Lord Shaw, he pointed out, had referred to *R. v. Keyn* as a case having reference on its merits to the limits of Admiralty jurisdiction. In the unreported case of *Ex parte Caminite* discussed below the Full Court of New South Wales said obiter and without argument on the point, quoting *Chellikani*'s case that 'The territorial limits of the State and its ownership of the bed of the sea extend from the coast outward to the three mile limit.' Ramaswamy takes it that *Chellikani*'s case settled that the territorial waters of India are within the bounds of that country: *The Law of the Indian Constitution* (1938), p. 192. He accepts without criticism Lord Shaw's observations on *R. v. Keyn*.

supported by observations on the effect of *R. v. Keyn*. He found there was nothing 'in the description of the boundaries of New South Wales which would specifically as a matter of grant include league waters', and quoting from Sir Robert Phillimore in *R. v. Keyn*, pointed out that Parliament had frequently legislated for the three-mile limit, whereas if these waters were territorial in the same sense as land there would be no reason to do so. Following *R. v. Gomez* he held that the word 'coast' in the Letters Patent of 1859 must be strictly interpreted to mean the low-water mark. The Queensland legislature, moreover, had treated the colony and its territorial waters as separate entities.¹ Too much importance should not, however, be attributed to this point. For example, the Pearl Shell and Bêche-de-Mer Fishery Amendment Act of 1891² speaks of the 'limits of territorial jurisdiction of Queensland'. The Fish and Oyster Act, 1914,³ defines 'Queensland waters' as all 'within the territorial limits of Queensland'. On the other hand, the Whaling Act, of 1936,⁴ is in force 'within Queensland and within all Queensland waters'. The Territorial Waters Jurisdiction Act of 1876, Philp J. held, did not affect the question of construction of the instruments defining the boundaries of the Australian States. The preamble to the Act implied that nothing but jurisdiction was being extended. 'That Act does not purport to alter the territorial boundaries of any colony or dominion except for the specifically enumerated criminal purposes.'

(iii) *The 'Tidelands' Question in Australia: Exclusive and Concurrent Powers of Maritime Jurisdiction*

Until the matter is finally decided in the courts the coincidence of Commonwealth and State fishery jurisdiction must remain a matter for speculation. The State Fisheries Departments enforce State legislation within both inland and territorial waters on the assumption that these are within the 'territorial limits' of the States. On the high seas no State jurisdiction is exercised because this is understood, though on not very decisive grounds, to be forbidden by the doctrine of colonial extra-territorial legislative incompetence.⁵ The Commonwealth exercises jurisdiction under the

¹ e.g. section 10 of the Navigation Act, 1876, extended the jurisdiction of the Marine Board one league to seaward. Philp J. concluded: 'If Queensland embraced league waters, all that need to have been referred to was "Queensland tidal waters".' Section 144 of the Customs Act, 1873, refers to 'the limits of any part of Queensland and within four leagues of the coast thereof', departing from the formula in the Imperial Hovering Acts, s. 206, refers to 'one league of the coast of any part of Queensland'. The Pearl Shell and Bêche-de-Mer Fishery Act of 1881, 45 Vict., No. 2, s. 3, refers to 'the Colony of Queensland and within the league to seaward from any part thereof'. On the other hand, 'fishing' is defined as recovery of oysters 'within the colony'.

² 55 Vict., No. 29.

³ 5 Geo. V, No. 23, s. 4.

⁴ 26 Geo. V, No. 39, s. 4.

⁵ In *William Holyman & Sons Pty. Ltd. v. Eyles* (1947), Tas. S.R. 11. Morris C.J. said obiter that the law of Tasmania did not run outside territorial waters. In *Chapman & Co., Ltd. v. Rose*, [1914] Q.S.R. 302 concerning an application under the Workers' Compensation Act of 1905 by

Constitution outside 'territorial limits', which has been taken to mean outside territorial waters. The present situation therefore is that the Commonwealth power is exercised exclusively on the high seas, the State power exclusively between high-water mark and the outer rim of the territorial sea. The implications of *R. v. Keyn* have been ignored in practice mainly because until the Commonwealth enacted its first Fisheries Act in 1952 the question of delimiting the boundary of Commonwealth and State legislative action did not arise. Questions of customs and excise jurisdiction are independent of the Commonwealth-State boundary because power over these matters is exclusive to the Commonwealth.¹ The question of property in the *solum* of the territorial sea has not directly arisen but it cannot be postponed indefinitely.² Exploitation of mineral and marine resources must

Mrs. Rose for compensation for the loss of her husband, who was alleged to have lost his life at sea, it was proved that the vessel was last seen anchored within three miles of an island admittedly part of Queensland, and also within three miles of the mainland. The Court accepted jurisdiction on the ground that the vessel had presumably foundered in Queensland territorial waters. It did not, however, direct itself to the juridical character of territorial waters, and perhaps was not required to do so since the Act defined a worker as one employed not only in Queensland, but also 'within the jurisdiction thereof'. It is possible that the States have judicial jurisdiction within the three-mile limit even if it be concluded that they have no proprietary interest. Chubb J. (at p. 325) found it necessary to say no more than that the territorial waters of Queensland comprise at least the open sea within one marine league from the mainland. Until 1947 it was accepted in the United States that the States had property in the three-mile belt: *State v. Pacific Guano Co.* (1884), 22 S.C. 50; *Port of Seattle v. Oregon and Washington Railroad* (1921), 255 U.S. 56 at p. 63; *Shively v. Bowlby* (1893), 152 U.S. 1; *Manchester v. Massachusetts* (1891), 139 U.S. 240; *McCready v. Virginia* (1876), 94 U.S. 391; *Martin v. Waddell* (1842), 16 Pet. 367. The classical decision was *Pollard v. Hagen* (1854), 3 How. 212. See Illig in *University of Pittsburgh Law Review*, vol. 14, No. 1, p. 10.

¹ Reference may be made to the New Zealand Customs Act, 1913, 4 Geo. V, No. 63, as amended in 1922, 13 Geo. V, No. 14. Several sections refer to searching within 'territorial waters': 165, 6, 206, 253, 270, 169, 216. Section 177, however, authorizes the exercise of any power in relation to any ship 'being in waters not comprised within the "territorial limits" of New Zealand'. It is clear that the Act presupposes that territorial waters are within the territorial limits of the Dominion. The Act was never challenged for extra-territoriality.

² The New South Wales Fisheries and Oysters Farms Act, 1935, No. 58, which is applied within the three-mile limit (Section 4) defines 'tidal waters' as those which ebb and flow over Crown Lands, and asserts a right of property in the Crown in the soil of such lands. Section 67 gives power to make grants of several oyster fishery without limitation to inland waters. The definition of 'tidal waters' in this Act and Section 4 of the South Australian Harbours Board Act, 1892, 56 Vict., No. 26, corresponds with that of Darling J. in *West Riding of Yorkshire Rivers Board v. Tadcaster* (1907), 97 L.T. 436 at p. 439. 'Tidal waters must be those which rise and fall, not because they have come up from the sea or estuary and must flow down again, but because when flowing down to their source towards the sea they are arrested in their course and compelled to rise by the action of the tide properly so called, and fall when that pressure is withdrawn.' This clearly envisages water outside the low-water mark. The South Australian legislature has in fact asserted a right of property in the three-mile belt. Section 4 of the Fisheries Act of 1917-35, No. 1293 of 1917, defines 'Crown lands' as including 'any foreshore, as well as any land under the sea within the territorial limits of the State, or under any tidal or inland waters'. Section 43 of the Harbours Act, 1936, No. 2290 defines the jurisdiction of Boards as 'within the distance of one nautical league to seaward from low water mark along any coastline of the State, or within any other territorial water of the State'. Section 19 of the Local Bodies Act, 1881, No. 237 is even less ambiguous: 'The powers, authorities and jurisdiction of the Board shall extend and be exercised in and over the limits of the said province, and the dependencies thereof, and to the distance of one nautical league to seaward from low water mark along the coast line.' Under this section local bodies still exercise authority to the three-mile limit.

eventually raise claims to exclusive rights. The Commonwealth asserts sovereignty over the Australian continental shelf,¹ and by enactment has sought to identify with the seabed of the shelf certain marine organisms attached to it. The claim to exclude all-comers from exploitation of these organisms is based on their legal assimilation to the status of the seabed. If the analysis of sovereignty earlier attempted in this paper is sound it follows that the Commonwealth has asserted a proprietary interest in the seabed and 'fixtures' upon it.² The question whether the State boundary is the low-water mark or the rim of territorial waters is thus pertinent to a delimitation of the respective boundaries of Commonwealth and State Crown lands.

If the territorial sea is State territory the question arises whether the boundary was fixed in 1900 in perpetuity at three miles, or can be enlarged by subsequent Commonwealth redefinition of the territorial limit. It may be that at some future date the Commonwealth might declare the territorial waters of Australia to be six or twelve miles. Would this have the effect of endowing the States with additional Crown land? The State boundaries were frozen at 1900 only in the sense that the criterion for their determination was then fixed; it was either the geographical phenomenon of the low-water mark or the juridical formula of the high seas boundary line. The physical boundary changes either by erosion or alluvion, and with it changes also the related territorial boundary whether it be the low-water mark or the three-mile limit. There seems no reason why executive or legislative enlargement of the territorial belt should not have the same effect as alluvion. Any conclusion to the contrary would be a manifest absurdity since it would partition the physical terrain into even more complex juridical divisions. It is, however, an intriguing aspect of federalism that by executive action the Federal Government should be able to endow the State with additional territory, thereby automatically altering the area within which State legislation operates. Since the definition of territorial waters in the Territorial Waters Jurisdiction Act would be affected it seems that an alteration in the extent of the maritime domain would involve legislation.

To the question of Federal or State property in the territorial sea perhaps no analytical answer is really possible, and the problem might be solved in terms of power and responsibilities rather than in terms of possession. The maritime boundary is not to be considered exclusively as the border between two governments in a federal system, but as also the border between

¹ *Commonwealth of Australia Gazette* (1953), No. 56, p. 2563. The interest now asserted by the United States in the continental shelf supports the view that the seabed of the shelf is as much the public domain (in Australian Crown land) as the land: Outer Continental Shelf Lands Act, 1953, 67 Stat. 462, s. 3 (a); Christopher in *Stanford Law Review*, 6 (1953), p. 23.

² The question is discussed by the present writer in *American Journal of International Law*, 49 (1955), p. 202.

the national and the international domain. The Federal Government is primarily concerned with the complex of rights and obligations that accrue under international law in relation to the territorial sea. As the United States Supreme Court¹ said, 'once low water mark is passed the international domain is reached. Property rights would then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign.'² Paramount rights, it was said, are greater than the rights of a 'mere property owner'.³ The question of State boundaries was thus shouldered aside. It is questionable, however, if the Supreme Court really succeeded in dissipating the element of property in thus defining the paramount rights of the Federal Government. Mr. Justice Frankfurter in his dissenting Judgment accurately explained the Court's decision as involving a 'sliding from absence of ownership by California to ownership by the United States'.⁴ There may be a nice distinction in the abstract between the concept of plenary competence and that of proprietary interest, but to a common lawyer it wears thin to the point of disappearance when in virtue of the competence licences to excavate, drill and occupy the seabed are granted on nearly similar terms to concessions on dry land. The thesis that property rights coalesce in the Federal Government as an incident of the dominant power which inheres in it gives a novel twist to federalism,⁵ and runs contrary to the trend of Australian constitutional tradition. The external affairs and defence powers in Australia may not be used to predicate a general predominance of Commonwealth over State interests⁶

¹ *U.S. v. California* (1947), 332 U.S. 19; *U.S. v. Louisiana* (1949), 339 U.S. 699; *U.S. v. Texas* (1949), 339 U.S. 707. An executive order, No. 9633, made at the time of the Continental Shelf proclamation, stated that the proclamation was to be of no legal effect in any litigation between the United States and a State, thus leaving open the question whether ownership of the seabed and subsoil of territorial waters was in the Federal or State governments. In 1937 a Bill had been introduced into Congress with the object of declaring that lands under marginal seas of all the coastal States were part of the public domain of the United States (S. 21641, 75th Congress, 1st sess.). Later a resolution was substituted for it, which asserted that all submerged lands below low-water mark and within the three-mile limit were the property of the Federal Government (S.J. Res. 208, 75th Congress, 1st sess.). This resolution passed the Senate with little debate (81 Cong. Rec. 9326), but was defeated in the House of Representatives after a vigorous political activity on the part of the States affected. In October 1945 the Federal Attorney-General instituted an original action in the Supreme Court against California, claiming ownership and paramount rights over the marginal belt within three miles of the Californian coast. The action was the result primarily of pressure from the Navy Department which was anxious to secure control of the oil resources in the submerged lands contiguous to the shore. The States retaliated by having a Bill introduced into Congress and passed which had the effect of releasing the marginal belt to the States. The Bill was, however, vetoed by the President, and Congress failed to override the veto. The same fate attended subsequent efforts to keep the problem exclusively within the political sphere, and a stalemate was produced when Congress failed to pass several bills offered by Federal Departments claiming the belt for the Federal Government. The matter could only be resolved by judicial process.

² *U.S. v. Texas* at p. 719.

³ Mr. Justice Black in *U.S. v. California* at p. 29.

⁴ *U.S. v. California* at p. 45.

⁵ Deduction from *U.S. v. Curtiss Wright Export Co.* (1936), 299 U.S. 304; Illig. loc. cit., p. 14.

⁶ *Reid v. Sinderberry* (1943), 68 C.L.R. 504; *Gratwick v. Johnson* (1945), 70 C.L.R. 1; *Communist Party Dissolution* case (1950), 83 C.L.R. 1.

especially in the matter of boundaries which are stabilized in the Constitution. State Crown land cannot under any theory at present admitted in Australian constitutional law 'slide' to the Commonwealth, and an Australian court would find great difficulty in deciding the question posed in this paper in any terms other than ownership, no matter how attractive it might be to approach the question from the point of view of the international competence of the Federal Government.

A decision that the State territorial limits embrace the territorial sea in no way inhibits the Commonwealth from exercising its international rights or fulfilling its international responsibilities therein, even in matters of fishery. The power to legislate 'with respect to external affairs', though never precisely defined by the courts¹ and never adequately explored in the literature, does confer on the Commonwealth some measure of paramountcy. An international fishery convention could be the device by which the Commonwealth would enter a field reserved to the States. In maritime matters this has not generally been adverted to, and the ratification of the International Whaling Convention in 1936 proceeded on the assumption² that the Commonwealth would have to seek a delegation of competence from the States in the performance of its obligations in the territorial sea. There seems no reason why the enactment as domestic legislation of an international convention in respect of fisheries should not be as effective to confer competence on the Commonwealth in territorial waters as on the high seas.

II. THE MARITIME BOUNDARY AND AUSTRALIAN BAYS

It is accepted in Australian practice that 'bays' are State and not Federal territory. There is, however, no agreement as to what constitutes a bay, and there is very little authority relating to Australian bays in particular. The test of what is a bay must be the same in constitutional as in international law, because if it is determined that an indentation is within the realm this automatically delimits the respective areas of national and international jurisdiction. In fact the British cases make no distinction between constitutional and international law when analysing the question;³ but

¹ *Roche v. Kronheimer* (1921), 29 C.L.R. 329; *R. v. Burgess* (1936), 55 C.L.R. 608.

² *Parl. Deb.*, 14th Parl. 2nd sess., R., vol. 149, p. 540.

³ *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877), L.R. 2 A.C. 394; *R. v. Cunningham* (1859), Bell's Cr. Cas. 72; *Peters v. Olesen*, 7 Ct. of Sess. Rep. 5 Ser. 86 at p. 93; *Mortensen v. Peters* (1906), 14 S.L.T. 230; *Mowat v. McFee* (1880), 5 S.C.R. 66; *Annakumar Pillai v. Muthupayal* (1903), 1 L.R. 27 Mad. 551 esp. at p. 573; *The Fagernes*, [1927] P. 311. Also in United States, esp. *Ocean Industries v. Superior Court of California* (1927), 200 Cal. 235; *U.S. v. Carrillo* (1935), 13 F. Supp. 120; *The People v. Stralla and Adams*, [1939] 96 Pac. (2a) 941; *U.S. v. Morel* 26 Fed. Cas. 1310; *Commonwealth v. Manchester* (1890), 152 Mass. 230 at p. 236; *Manchester v. Massachusetts* (1891), 139 U.S. 240; *Mahler v. Norwich and New York Transportation Co.* (1866), 35 N.Y. 352 at p. 355; *The J. Duffy* (1927), 18F (2a) 754. Also see *Anglo-Norwegian Fisheries case*, I.C.J. Reports, 1951, p. 132: 'The delimitation of the sea has always an international aspect.'

neither have they laid down a comprehensive and exclusive criterion. At least three tests may be historically distinguished in English jurisprudence. The earliest was the visual test. In the reign of Edward II it was held in a rather obscure case that a coroner could perform his office on an arm of the sea where a man could see from land to land.¹ This was followed in the early nineteenth century by the effective control test, an emanation from the cannon-shot rule, which would, if strictly applied, produce a maximum closing line of six miles.² Practice, and notably British practice, has not, however, limited itself so narrowly, and the prevailing criterion has been one of relative dimensions and configuration.³ Distinctions have been attempted between bays and gulfs, the former being shallow indentations susceptible of treatment on the six-mile principle, and the latter deep penetrations of the mainland with entrances wider than six miles but proportionate to the extent of enclosed waters,⁴ and which, being geographically assimilated to the land, could be regarded as internal waters. Symmetrical as the distinction may be it is in fact deceptive since there is no single geographical conception of either 'bay' or 'gulf', and neither the International Law Commission nor the Final Act of the Geneva Conference attempt more than a distinction between substantial indentations and mere trends of the coast line.

The theory of effective control can be regarded, if divorced from the cannon-shot rule, as a rationale for the test of configuration: if the penetration is such as to withdraw the indentation from international traffic and the normal incidents of the régime of the high seas, the littoral State may be taken to have substantially effective control of the enclosed waters even though the closing line is extensive.⁵ The doctrine of historic waters is frequently used to validate claims to large areas of enclosed sea, but only by writers, generally speaking, who seek to regard such areas as derogations

¹ Fitzherbert, *Corone*, 399, 8 Edw. 2; Coke, 4th Inst. 140; Hale, *De Jure Maris*, p. 1, c. 4; *Commonwealth v. Peters* (1847), 12 Met. 387.

² Vattel, *Droit des gens*, Bk. 1, c. xxiii, s. 291; *R. v. Forty-Nine Casks of Brandy* (1836), 3 Hagg Adm. 290; Ortolan, op. cit., vol. i, p. 145; Calvo, op. cit., vol. i, s. 367; Wheaton, op. cit., s. 188; Pradier-Fodéré, op. cit., vol. ii, p. 662.

³ *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877), L.R. 2 App. Cas. 394 at p. 419 per Lord Blackburn: 'It seems generally agreed that where the configuration and dimensions of the bay are such as to shew that the nation occupying the adjoining coasts also occupies the bay it is part of the territory.' In *R. v. Cunningham* (1859), Bell's Cr. Cas. 72, it was said: 'We are of opinion that looking at the local situation of this sea it may be taken to belong to the counties respectively by the shores of which it is bounded.' *The Fagernes*, [1927] P. 311 is best treated as dictated by the policy in the Home Office certificate and not as laying down any principle: Bellot in this *Year Book*, 10 (1929), p. 121. In the *Alaska Boundary* arbitration, 1903, *Proceedings*, iv, p. 30, the British Government argued that the territoriality of Conception Bay was established by prescription and acquiescence, and that therefore the rules of dimensions and configuration had never been made the ground of any judicial determination. But see the 'British Reply' in the *Anglo-Norwegian Fisheries* case, loc. cit., p. 613.

⁴ Westlake, op. cit., p. 191.

⁵ Hall, op. cit., p. 197; Brierly, op. cit., p. 138. This is supported by the International Law Commission formula, loc. cit. (A/3159), Article 7 (1).

from general, conservative limitations imposed by international law.¹ It is doubtful if there is such a doctrine. The historical argument has been employed in the instances in question² as evidence of appropriation rather than of acquiescence by other powers, whereas if the supposed doctrine were one of derogation attention would primarily have been directed to proof of foreign recognition of the pretended régime. Except in a negative sense such proof is not readily forthcoming. Sometimes the doctrine of historic waters is equated with acquisitive prescription, when the evidence of long exercise of jurisdiction is seen as proof of the adverse interest. But against whom is the interest adverse? When the sea is characterized as *res communis* this does not mean it is common property in respect of which a particular interest may crystallize in time, but rather property put beyond appropriation altogether.³ For this reason it is extremely doubtful if the concept of prescription has any relevance to the problem of the maritime boundary,⁴ and historic waters as a concept should be restricted to exceptional régimes especially sanctioned by general and not particular State practice.⁵ Once the problem of bays is detached from the notion of historic waters⁶ the precedents can be examined for illustration of principle, and not

¹ Hershey, *op. cit.*, p. 295; Drago's opinion in the *North Atlantic Coast Fisheries* arbitration, 1910, *Proceedings*, vol. x, p. 205. Fauchille, *op. cit.*, p. 380; Gidel, *op. cit.*, vol. iii, p. 651.

² *Fonseca Gulf* arbitration; Rodriguez Gonzalez, *El Golfo de Fonseca en el Derecho Publico Centroamericano*, (1917); *El Golfo de Fonseca y El Tratado Bryan-Chamorro*, (1917); *Anales de la Corte de Justicia Centroamericano*, 5-7 (1916, 1917); *American Journal of International Law*, 10 (1916), pp. 344, 509; 11 (1917), pp. 181, 674; *Monterey Bay, Ocean Industries v. Green* (1926), 15 F (2d) 862; *Delaware Bay, The Grange*, Moore, *op. cit.*, pp. 735, 738; *Chesapeake Bay, The Alleganean*, Scott, *Cases in International Law* (1922), p. 236.

³ But see Reply of Great Britain in the *Norwegian Fisheries* case quoting Hurst and Gidel, *loc. cit.*, p. 649.

⁴ An interesting debate on the jurisprudence of this point is to be found in the Counter Memorial of the Norwegian Government, *loc. cit.*, vol. i, pp. 541, 547 and the Reply of Great Britain, *loc. cit.*, vol. ii, p. 621 in the *Anglo-Norwegian Fisheries* case. Great Britain admitted that geographical configuration and reasonable need are basic factors without which an exceptional claim will not receive assent of nations so as to constitute an historic title. Norway disputed that historic title is ever a separate ground of title. At p. 632 Great Britain indicated that it requires either a direct acquiescence or prescription fortified by tacit acquiescence. Australian doctrine would seem to be similar: C. 74, M. 39, 1929 V. See the French view, *ibid.*, vol. iv, p. 605. The doctrine suggested in this paper is approved by Gidel, *op. cit.*, p. 651 and MacGibbon in this *Year Book*, 31 (1954), p. 152 et seq. He surveys all the evidence for the doctrine.

⁵ See the United States view in 'Bases of Discussion', *loc. cit.*, p. 107. Efforts have been made to link together under a single formula the notion of title by immemorial possession and acquisitive prescription (e.g. Hall, *op. cit.*, p. 218; de Visscher, *Théories et Réalités en droit international public* (1953), p. 244), but they have not been very successful. See the contrasting attitudes of Johnson in this *Year Book*, 27 (1950), p. 332, in which prescription to the sea is accepted as a doctrine, and in *Cambridge Law Journal* (1955), p. 219. Immemorial possession cannot be a root of title to a *res nullius* since occupation suffices, and thus can mean either historic title sanctioned by general international assent or acquisitive prescription: Beckett in *Recueil des cours de l'Académie de droit international*, 50 (1934), p. 218. In either case it is not helpful in relation to the determination of the seaward boundary. Only where there is an historic dispute as in the case of Norway can there be an historic title (*I.C.J. Reports*, 1951, p. 130; Fitzmaurice, *loc. cit.*, pp. 381, 426, n. 2; MacGibbon, *loc. cit.*). De Visscher can mean nothing more than this when he distinguishes 'consolidation' from occupation: *op. cit.*, p. 245.

⁶ *Anglo-Norwegian Fisheries* case, *I.C.J. Reports*, 1951, p. 130. Waldock in this *Year Book*, 28

merely as specific and unconnected instances. In most cases the principle to be detected favours a relative geographical test¹ and is opposed to a pragmatically limited closing line.² What has long been a tendency in English cases on 'bays' is now formulated as a precise criterion in the Final Act of the Geneva Conference on the Law of the Sea,³ and the tests in international and in constitutional law seem to be coincident.

The Commonwealth Government has tended to follow that of the United Kingdom in favouring, no doubt in the interests of legal certainty, a ten-mile rule for bays,⁴ but in practice it has adopted the narrower criterion of the double three-mile limit. For example, the instructions to the Royal Australian Navy of 22 July 1955 relating to Queensland waters require naval officers to police Commonwealth fisheries outside 'a straight base line drawn across the gulf or bays at the point nearest the entrance or mouth where the breadth does not exceed 6 miles'. Up to date, therefore, there seems to have been no settled Commonwealth policy in relation to bays, and the problem of the State-Federal boundary therein has scarcely ever been considered. Should the Commonwealth decide to ratify the conventions drafted at the Geneva Conference which accept closing lines up to 24 miles, the 24-mile rule for bays will presumably be applied by the Federal Government in formulating Australia's maritime claims. As a result it may be that the States will find themselves suddenly endowed with territory that they never imagined to be theirs, and perhaps in some instances they may find the Commonwealth seeking to deprive them of territory which they did imagine to be theirs. The questions raised by the Geneva formula may be illustrated by reference to the two gulfs of South

(1951), p. 155 who admits that the decision restricts the category of historic waters to areas not properly defined as 'bays' and warrants a return to the headland theory, which the British Government assumed as interred in *The Washington* (Moore, *International Arbitrations*, vol. iv, p. 4342).

¹ Reeves in *American Journal of International Law*, 24 (1930), p. 498. English and French writers distinguish differently between bays and gulfs: Gidel, op. cit., vol. iii, p. 533; Boggs in *American Journal of International Law*, 24 (1930), p. 549. In 1930 Great Britain defined a bay as 'something more pronounced than a mere curvature of the coast. There must be a distinct and well-defined inlet, moderate in size and long in proportion to its width': 'Bases of Discussion', loc. cit., p. 41. Cf. the definition of the Permanent Court of Arbitration in the *North Atlantic Coast Fisheries* arbitration, loc. cit., and in *Ocean Industries v. Green* (1926), 15 F (2d), 862. See the Geographical principle in *The Allegenean*; Scott, *Cases on International Law* (1922), p. 237.

² Whether 6 or 10 miles, and whether associated with range of vision: Barclay in *Annuaire de droit international*, 13 (1894), p. 145; Hurst, loc. cit., p. 42; Gidel, op. cit., vol. iii, p. 572; Dunham v. Lamphere, Scott, *Cases on International Law* (1922), p. 237, n. 27; Lord Salisbury in Hansard, *Parl. Deb.* (1895), s. 4, H.L., vol. 23, c. 494; 'Bayard-Chamberlain Convention negotiations', *British and Foreign State Papers*, vol. 79 (1888), p. 287; Gidel, op. cit., p. 553; *Alaska Boundary* arbitration, British Counter-Case, p. 24; *North Atlantic Coast Fisheries* arbitration 1910, Case of Great Britain, p. 107 and Annex to the British Counter-Memorial, *ibid.*, vol. ii, p. 267; *Anglo-Norwegian Fisheries case*, *I.C.J. Reports*, 1951, p. 131.

³ Article 7.

⁴ Loc. cit., C. 74, M. 39, 1929 V., p. 118. Owing to the pearling dispute with Japan being *sub judice* the Australian Government refrained from replying to the questions addressed by the International Law Commission in 1954-5.

Australia, Spencer's and St. Vincent's, which are withdrawn from the ocean by Kangaroo Island. A closing line directly from the head of the Australian Bight to Kangaroo Island is 85 miles. The actual entrances to the two gulfs, depending upon the line chosen, are 70 miles, 58 miles, 38 miles and 28 miles. Strict application of the 24-mile entrance would mean that State territory is restricted to the head of Spencer's Gulf and to about half only of St. Vincent's, with the consequence that Kangaroo Island would be totally surrounded by territorial sea and not on its inland side by internal waters. This has obvious implications for the South Australian fisheries power, and since the twin gulfs are rich in fish it is a matter that State politics cannot ignore.

There are, however, in the case of the South Australian gulfs alternatives to the 24-mile rule. They may be State territory by definition in the State constitution, by historic processes or by application of the straight base-line principle adopted in the Final Act of the Geneva Conference.¹ It remains to examine the alternatives in turn. In 1834² legislation empowered the Crown to set up the Province of South Australia, which was described as lying 'between the Southern Ocean and the twenty-six degrees of South latitude, together with all and every the islands adjacent thereto and the bays and gulfs thereof'. In the Letters Patent constituting the Office of Governor of 28 April 1877, the colony was similarly described with the addition of 'and every the gulfs, bays, creeks, rivers, and islands (including Kangaroo Island)'.³ What was meant by the 'Southern Ocean' and by 'every the gulfs, bays'? Did this grant include the two gulfs in question, and if so where is the closing line of the Southern Ocean? The actual exercise of Federal and State jurisdictions in the gulfs is obscure. Although the State Fisheries Department has assumed that it has no jurisdiction extra-territorially, and therefore cannot control the fishing industry in the wider reaches of the gulfs, some of the narrower subsidiary bays within the gulfs have been subjected to the operation of the fishery proclamations, even when the closing line is 37 miles.⁴ The very fact that large areas of the gulfs are thus treated as intra-territorial (assuming that there is no extra-territorial State fishery jurisdiction) is perhaps evidence of a State appropriation of the whole area.

Apart from these proclamations there is no evidence that the State Government has treated the gulfs as within the State boundary. An interesting, unreported decision has, however, been found in recent research in the Supreme Court archives at Adelaide. In *R. v. Wilson* (1875) the Court

¹ Article 4 of the Convention on the Territorial Sea.

² 4 & 5 Wm. IV, c. 95.

³ Blackmore, *The Constitution of South Australia* (1894), p. 138.

⁴ *South Australian Gazette*, 25 September 1952; 6 March 1952; 21 September 1950; 1 June 1950; 5 January 1950; 11 March 1948; 29 August 1946; 28 February 1946; 8 July 1943; 26 November 1942; 5 June 1941.

entertained a charge of murder on board *H.M.S. Sappho* in the waters between Kangaroo Island and the mainland. A plea was raised to the jurisdiction, and in his Judgment Stow J. adopted the configuration test, saying:

'The question as to whether the Gulf is part of the Province has never been decided. The only question is whether it is land-locked. According to International Law any land-locked Gulf is part of a country. The entrance being blocked by Kangaroo Island, I cannot see how the Gulf is not land-locked on three sides. I have consulted with the Chief Justice (Sir Richard Hanson) and he thinks with me that Gulf St. Vincent is within the real limits of South Australia. I agree with him and have always considered it to be so.'

The question that arises, assuming this decision will be followed, is whether the maximum base-line is taken as the closing point. Reliance could be placed on the passage in the *Anglo-Norwegian Fisheries* case in which the possibility of several lines is envisaged. 'In such cases the coastal State would seem to be in the best position to appraise the local conditions dictating the selection.'¹ The analogy, perhaps, is with Svaerholthaven where a complex of fiords was enclosed by lines of 50 and 75 miles respectively, or LoppHAVET basin, a 'defined geographical whole' of large islands separated by inlets that terminate as fiords. The problem is, however, to ascertain who is competent to apply the base-line principle. Is it the Commonwealth, the State, the High Court or a State court? The base-line formula in the Final Act at Geneva is said to be applicable to a coast deeply indented, with a fringe of islands in its vicinity, where the enclosure would not depart to any appreciable extent from the general direction of the coast and where the sea areas lying within the lines are sufficiently clearly linked to the land domain to be subject to the régime of internal waters. This could be a description of the geographical-juridical situation of the South Australian gulfs, but what is not certain is whether the base-line principle is merely a standard which a Government might choose in legislating for its boundary or whether it is in addition a criterion of judgment for a court which is called upon to decide on the status of a given spot.

So far there is no example of a court adopting the base-line principle and, indeed, it scarcely could do so precisely in those terms. Its function is to decide if at a given moment a given spot is within the national boundary, and although it might be influenced by consideration of the permissibility of base-line in international law it will certainly make no attempt to define it. In effect the decision might place a spot in national territory that is so far removed from land as to make the choice of maximum closing line inevitable. The drawing of the line, however, is a governmental function, and the issue as it presents itself for discussion is whether a choice of line

¹ *I.C.J. Reports*, 1951, p. 130.

by the Commonwealth automatically establishes the State boundary, or a choice of line by the State automatically establishes the national boundary. The thesis of State sovereignty in a federal system led the Supreme Court of the United States in 1917 to conclude that 'it is a right of sovereignty inherent in States to fix their boundaries',¹ even when they were fixed at a point some miles to sea. The problem with such a doctrine is that the initiative of the State commits the Federal Government to an enlarged national domain perhaps involving international responsibility. Such a conclusion has more recently been frowned upon by the Supreme Court which has tended to consider that the State boundary cannot extend beyond the boundary of the nation.² To date, the question has not been concluded in the United States and it would be improper to anticipate an answer while it is still *sub judice*. Texas, having recovered its territorial sea as part of its public domain by Act of Congress reversing the tidelands decision, claims to be able to fix its own maritime boundary in the Gulf of Mexico at a distance greater than elsewhere on the coast of the United States. It is a different question from that which presented itself to California when contemplating a base-line within the formula of the *Norwegian Fisheries* case in an effort to recover the seabed transferred to the Federal Government in the tidelands case.

One approach to the question would be, in terms of the United States decisions, from the position of State sovereignty. It is implicit in any State Constitution that the boundary of the State includes those internal waters which international law permits the State to regard as such, and which the State does so regard. The definition of the boundary could be considered as making explicit what is already implied.³ The legislative or executive function in this respect is perhaps no different from the judicial. A court called upon to determine if a relevant point at sea is to be regarded as part of the mainland will decide the question in the light of history, statutory construction, administrative practice and general circumstances.⁴ The result

¹ *Pope v. Blanton*, 10 Fed. Supp. 18.

² Wilson in *Cornell Law Review*, 21 (1936), p. 650; Loret in *Tulane Law Review*, 13 (1939), p. 253; *Columbia Law Review*, 39 (1939), p. 317. See *Lipscomb v. Gialourakis*, 101 Fla. 1130 in which the Supreme Court of Florida also upheld the statute.

³ *Brue's case* (1812) Leach's C.C. 1893 held that Milford Haven was part of a county. In *The Fagermes* it was accepted that it was the duty of the Court to take judicial notice of the extent of the King's dominions (at p. 326 *per* Lawrence L.J.) following *Direct United States Cable Co.* case, *per* Lord Blackburn at p. 416. The Constitution of California (s. 1) raises the same question of definition as does that of South Australia, and the State courts have decided whether areas of water are within the State: *Ex parte Keil* (1890), 85 Cal. 310; *In re Marincovich* (1920), 48 Cal. App. 474; *Ocean Industries v. Superior Court* (1927), 200 Cal. 235; *People v. Stralla* (1939), 14 Cal. 2d 617. Furthermore, California claims that *Manchester v. Massachusetts* (1891), 139 U.S. 240 is authority for the proposition that so long as the limits allowed by the *Anglo-Norwegian Fisheries* decision are not exceeded it is within State sovereignty to define its 'bays' by legislation without specific Federal action: Brief for the State of California in the Proceedings before the Special Master, No. 6, 1951, p. 43 et seq.: *U.S. v. California*.

⁴ *Adams v. Bay of Islands County*, [1916] N.Z.L.R. 65. See the *Varanger Fiord* case, *Annual*

of the decision is to attribute that point to the State. There is no annexation of territory, no extension of boundary, if the definition is made judicially, and the same would seem to be the case if it is made executively. In the Queensland cases on territorial waters already discussed the courts seem to have taken it for granted that by legislation the State could claim its territorial belt, and extensive investigation of State legislation was undertaken to determine if this had been done. It seems possible to conclude that State legislation defining internal waters would be similarly regarded, and the outcome would be to commit the Commonwealth to the boundary so designated. Another approach to the question could, however, be from the general paramountcy which the Commonwealth enjoys as a result of its international responsibility and competence. Commonwealth legislation defining a boundary might prevail over State legislation under the doctrine of inconsistency,¹ although it is not primarily a collision of exercises of power that is involved but the fixing of the physical area of its exercise. A collision of executive actions such as proclamations is not provided for under the Constitution and could be resolved only by attributing to the Federal Government paramountcy in the matter of fixing the national boundary. The absence of doctrine in this field raises the interesting question whether an External Affairs or Internal Affairs Department certificate would be decisive in a State court,² or even in the High Court, when as a result the State boundary is affected. Under conceptions of paramountcy the Commonwealth certificate might have the same legal significance as it has in unitary systems, but under conceptions of federalism it may not. Suppose, for example, that a court is concerned with an event taking place in one of the gulfs of South Australia beyond a 24-mile closing line, and suppose it seeks a certificate which says the Commonwealth recognizes only a 24-mile closing line at that point in particular, or generally on the Australian coast. Is the court thereby excluded from making its own analysis of the expression 'bays' and 'gulfs' in the South Australian Constitution? Is it to ignore perhaps evidence of appropriation over a period of time? One would think not, for the alternative would mean that the Federal Government in any British federation could abandon a claim to an 'historic bay' merely by executive certificate, thereby depriving the constituent element of the federation of portion of the territory over which it was undoubtedly sovereign. The exact situation might arise if Canada were to give a certificate in which it is made clear that the famous claim to Conception Bay has been abandoned with the loss to Newfoundland of

Digest, 1933-1934, Case No. 51, where it was held that no legislative or administrative act was required for drawing the line of territorial waters. See the Norwegian Counter Memorial in the *Anglo-Norwegian Fisheries* case, loc. cit., vol. i, p. 269.

¹ Section 109 of the Constitution.

² Cf. Lyons in this *Year Book*, 23 (1946), p. 240.

territory which it previously possessed. One can no more imagine this than one can imagine Delaware and New Jersey being deprived of Delaware Bay by Federal proclamation. One is tempted to conclude that an executive certificate, whatever effect it may have in a unitary system, may not necessarily be conclusive in a Federal, where the judiciary is the arbiter of competitive executive as well as legislative functions.

The interaction of Federal and local claims to bays is an obscure topic which is rendered more obscure by inconsistent practice.¹ While Vancouver Sound² and the Newfoundland bays³ are Provincial territory because they are internal waters, neither Hudson's Bay,⁴ nor the St. Lawrence Estuary,⁵ which are both either claimed or suggested to be Canadian internal waters, are considered by the littoral provinces as possessed by them,⁶ although the implications in regard to fisheries are substantial. Shark Bay in Western Australia with a closing line of 14 miles has had a long history of enclosure and has been claimed as State territory in State legislation.⁷ On 18 March 1887 the Law Officers were advised that the Governor of Western Australia had been informed that it was not possible to regulate pearl fishery more than three miles offshore, and that it was important to decide if the three-mile

¹ In the United States a decision that water is within the national domain attributes the water to the States. *Ocean Industries v. Superior Court* (1927), 200 Cal. 275; *The J. Duffy* (1927-8), F. (2d) 754; *U.S. v. Carrillo* (1935), 13 F. Supp. 121; *State v. Ruvido* 15 A (2d) 293; *Commonwealth v. Manchester* (1890), 152 Mass. 230; *Mahler v. Norwich and New York Transportation Co.* (1866), 35 N.Y. 352; *The People v. Stralla and Adams* (1939), 96 P. (2d) 941; Delaware Bay: *New Jersey v. Delaware* (1934), 291 U.S. 361; 295 U.S. 694; *Revised Statutes of New Jersey*, ss. 52; 52: 28-45, Article 3, Chesapeake Bay: *Annotated Code of Maryland* (1951), Articles 27, 34, 37, 63, 66c.

² *R. v. Kizo Furazairo* (1930), 42 Br. Col. Rep. 548.

³ A general conclusion from the *North Atlantic Coast* arbitration award, 1910 and *Direct United States Cable Co.* case (1877), L.R. 2 App. Cas. 394. The question of Newfoundland Bays is discussed in *Canadian Journal of Economic and Political Science*, August 1949, p. 345, where the 10-mile rule that applies as a result of the Award of 1910 is considered to be an exception to the rule for Eastern Canada generally.

⁴ Pitt Cobbett (4th ed.), p. 148; Gidel, op. cit., vol. iii, p. 660; Johnson in this *Year Book*, 15 (1934), p. 1; Balch in *American Journal of International Law*, 6 (1912), p. 409; *Revue de droit international et de législation comparée*, 2^e ser., 13 (1911), p. 539; *Geographical Review*, vol. 41, p. 185; *Toronto Law Journal*, 11 (1956), p. 243; Fisheries Amendment Act 1906, 5 Edw. VII, c. 13, s. 14 defines Hudson's Bay as 'wholly territorial water of Canada'. The 1910 award treaty expressly excludes the Bay: Malloy's *Treaties*, vol. iii, 2632, Article 2. On 15 July 1930 control of fishery was transferred from the Dominion to Manitoba: *Revised Statutes of Manitoba* (1940), c. 148, s. 10. The relationship between the Dominion and the Provinces in the matters of exclusive fishery and proprietary right over fishing was discussed in *R. v. Wagner*, 40 Manitoba Rep. 305; *R. v. Tomasson*, *ibid.*, 321. One of the difficulties involved in a Provincial assertion of boundaries is Section 43 of the Dominion Fisheries Act, 1932, which empowers the Dominion Fisheries Minister to define the boundaries of tidal water and estuaries.

⁵ Act to Amend Canadian Shipping Act, 1948, Stat. Can. 1948, 11-12 Geo. VI, c. 35, s. 1 (4): 'Inland waters of Canada mean all the rivers, lakes and other navigable waters within Canada, and includes the river St. Lawrence as far seaward as a straight line drawn from Cap des Rosiers through West Point Anticosti Island extending to the north shore.' The respective distances are 62 and 25 miles. But see Campbell C.J. in *Gavin v. The Queen*, [1956] 3 D.L.R. 547 at p. 552.

⁶ Although in correspondence with the writer the Attorney General of one of the littoral Provinces indicated that it was not impossible that some such claims might be made in the future. In Germany bays are within the State boundaries: *Lübeck v. Mecklenburg-Schwerin*, *Annual Digest*, 1927-1928, Case 88.

⁷ No. 84 of 1912.

limit was determined by a line which follows the indentations of the actual shore, or, where a bay occurs, by a line drawn from headland to headland. The Law Officers¹ reported:

'That in our opinion the three mile limit is determined by a line following the indentation of the shore, when such shore fronts the open sea, or in the case of bays or inlets having the character, by their configuration, of inland waters, the base line crosses from headland to headland at the mouth of such bay or inlet; a much wider range of exclusive dominion may be established not only by treaty, but by long acquiescence or recognition by other nations. Further, against its own subjects a State can, by its own particular laws, exercise command at any distance from its shores.

'In our opinion the whole of Shark Bay, as defined by the Shark Bay Fishery Act of 1886, would be recognized internationally as territorial waters of Her Majesty's dominions.'²

The Commonwealth seems to have acknowledged Western Australia's claim,³ and possibly has regarded itself as constitutionally incompetent to reverse it. The other bays on the Australian coast have been enclosed by either State or Federal action and it seems to have been taken for granted that the initiative of either authority is sufficient. In 1934 an opinion was given to the Queensland Government favouring a six-mile rule, but in practice Queensland has not adhered to it. The limits of Queensland harbours, for example, designated by Order in Council of 10 December 1892, enclose larger areas. One of these, Moreton Bay, is enclosed by a line of $8\frac{1}{2}$ miles and is recognized by the Navy Office as an 'historic' bay.⁴ Exmouth Gulf in Western Australia (24 miles) and Van Diemen Gulf (16 miles) are similarly treated and it is possible that other bays, in respect of which no final judgment has been made, could be described as inland waters.⁵ Ultimately it is policy as much as international law which fixes the maritime boundary. The United Kingdom Government made this clear in a written answer in the House of Commons on 15 March 1956: 'It is in the general interests of the United Kingdom that States should limit their claims to territorial waters, and it is not therefore proposed to extend our territorial waters so as to include the Thames estuary from headland to headland, even if it were permissible under international law to do so.'⁶ In Australia the Navy Department is anxious to restrict the national boundary as far as possible because of the difficulty of policing a long and complicated coastline, and because it does not want to encourage Indonesia to make excessive claims in its Archipelago, while the States are anxious for economic reasons to expand it. The resulting collision of policies could lead to

¹ Webster, Clarke.

² *C.O. Law Officers' Opinions*, vol. iv, No. 87.

³ Charteris, *Chapters on International Law* (1940), p. 94.

⁴ *Ibid.*, p. 99.

⁵ e.g. Buckingham Bay 20 miles, Blue Mud Bay 15, Coffin Bay 12, Streaky Bay 14, Roebuck Bay 14, Broad Sound 15, Upstart Bay 10, Hervey Bay 38, Oyster Bay 15 and Storm Bay 13.

⁶ Hansard, *Parl. Deb.* (1956), vol. 550, H.C., s. 5, c. 68.

conflicting executive actions which would provide a nice question of Federal constitutional law for a court to unravel.

III. THE MARITIME BOUNDARY OF QUEENSLAND; THE BARRIER REEF

A. *The Significance of the Queensland Coast Islands Act, 1879*

It has long been a popular misconception that the line drawn on maps of Australia to indicate the area of sea within which islands are attributed to Queensland constitutes the Queensland maritime boundary.¹ This is certainly not the case, and in fact Imperial, Commonwealth and State practice in the matter has been based on the most conservative constructions of British attitudes towards the freedom of the seas. When Queensland was separated from New South Wales in 1859 doubts immediately arose as to jurisdiction over the islands off the coast. On 26 May 1863 the Law Officers² advised that the jurisdiction of Queensland included all islands in the Pacific, the Gulf of Carpentaria and Torres Strait east of the 138th meridian and north of Point Danger which were originally included in New South Wales, all the islands in the Pacific lying north of the 40th parallel between the eastern coast of Australia and the 154th meridian, all islands in the Gulf of Carpentaria, 'and such (if any there be) of the islands in Torres Strait as ought from their position, properly to be regarded as dependencies of the mainland of Australia, were originally included in the Colony of New South Wales as defined in the Letters Patent of September 8 1855'. They went on: '*Prima facie* all islands in Torres Straits within three miles of the mainland of Australia, or within three miles from any other island there in British occupation, or in British territorial waters, would be dependencies of Australia, and no islands beyond that distance, and not *de facto* occupied by Great Britain would possess that character.' They recommended that possession should be taken of islands outside territorial waters.³ This opinion called attention to the fact that New South Wales had purported to exercise jurisdiction over the Great Barrier Reef, for example, in the matter of guano licences, and that it was absurd that islands off the coast of Queensland should be either unappropriated or still subject to New South Wales. The Queensland Government accordingly

¹ The misconception appears in the memorandum submitted to the State Department by the United States Consul General in London in 1923 and reproduced in Hackworth, *Digest of International Law* (1941), vol. ii, p. 678; in *Transactions of the Grotius Society*, 13 (1924), p. 76; this *Year Book*, 9 (1928), p. 123; in Goldie in *Sydney Law Review*, 1 (1953), p. 95 note; in Colombos, *op. cit.*, p. 116; in Jessup, *The Law of Territorial Waters* (1927), p. 16; in Mouton, *The Continental Shelf* (1952), p. 140; and in the *Reports of the Great Barrier Reef Committee* (1928), vol. ii, p. 97. Riesenfeld wrongly draws the conclusion that the Queensland fishery legislation has operated over a wide area of high seas: *Protection of Coastal Fisheries under International Law* (1942), p. 170.

² Atherton, Roundell Palmer.

³ *C.O. Law Officers' Opinions*, vol. i, No. 185.

placed the matter before the Colonial Office, and as a result Letters Patent were issued on 30 May 1872 giving the Governor power to annex islands within 60 miles of the coast. On 16 August 1872 the Legislative Council resolved upon annexation and asked the Governor to exercise his powers, which he did by Proclamation on 22 August. The question of islands outside the 60 mile line was debated for some years, and on 10 October 1878 further Letters Patent were issued to authorize the Governor to annex them. As already mentioned, legislation was passed in Queensland in the following year to incorporate in the Colony islands within the waters defined in the schedule.¹ These instruments were incorporated in Letters Patent of 10 June 1925 reconstituting the office of the Governor of Queensland.² A history of the administration of the Queensland coast islands disposes of the notion that the legal effect of the instruments was to include within the State boundary the waters intermediate between the islands.

On the Letters Patent of 30 May 1872 the Law Officers³ ruled on 25 March 1875 that Queensland had no legislative authority over the seas beyond the distance of three marine miles from low-water mark on the mainland and islands respectively, and that the whole of an island which lies partly within and partly without the 60-mile limit belonged to the colony.⁴ On several occasions an opinion has been given to the Queensland Government to the same effect, and that only a belt of three miles around cays dry at low water is within State jurisdiction. Pursuant to these opinions the boundary of petty sessions districts was defined as the territorial waters around each island, and in 1954 the coroner at Thursday Island refused jurisdiction in respect of events occurring eight miles from the island. In 1934 an opinion was given to the State Government to the effect that the Act of 1879 did not give sovereignty over intervening waters and that accordingly foreigners could be controlled in their fishing only by the indirect means indicated in *Rhodes v. Fairweather*,⁵ that is, in cases where they were required to make use of the shore. It was mentioned that the powers given by Acts of the Federal Council to control pearling (which remained in force until 1952) had been 'efficacious to compel observance of rules on the high seas by foreign vessels since these had to make use of the shore'. In instructions to Australian fishery protection vessels the Navy Office on 21 April 1955 directed that 'although officially the eastern boundary of Queensland follows the line of the Barrier Reef it only fixes a boundary within which all islands form part of Queensland territory; there is no intention to assert jurisdiction over the total sea area inside the

¹ These instruments are mentioned by Cumbrae-Stewart in *Journal of Comparative Legislation and International Law*, 12 (1930), p. 299.

² *Queensland Statutes*, p. 11263.

⁴ *C.O. Law Officers' Opinions*, vol. iii, No. 53.

⁵ *Newfoundland Decisions* (1888), p. 321.

³ Baggallay, Holker.

Barrier Reef'. Without specific direction no legislative or executive instrument defining colonial boundaries is to be construed as including high seas. Opinion to this effect was given by the Law Officers on 8 August 1886 interpreting the definition of Western Australia in the Letters Patent to the Governor in 1830 as 'Extending from the parallel of $13^{\circ} 13^m$ s. lat. to Cape Howe in the parallel of $35^{\circ} 8^m$ s. lat., and from Hartog's Island on the western coast in long. $112^{\circ} 52^m$ to 129° east long., including all the islands in the Indian and Southern Ocean within the latitudes aforesaid, and within the longitudes aforesaid.' The Law Officers were of opinion that it would not be possible for the Crown to assume possession of the seabed within these boundaries but outside the three-mile limit.¹ It may be noted, finally, that the supposed Queensland claim to the waters was disposed of with the consent of the Commonwealth Government in the pleadings in the *Anglo-Norwegian Fisheries* case.² Also the Commonwealth Government has refused to entertain the argument that foreign fishermen can be prohibited from fishing in the waters between Queensland and the Reef.³

B. Conflicts of Jurisdiction within the Barrier Reef

Australia has conformed with universal practice in attributing a belt of territorial waters to islands.⁴ Opinions to this effect have several times been given to the New South Wales Government. Problems have arisen, however, in determining what is an island, and also in delimiting the respective areas of Federal and State jurisdiction in a complex of islands, reefs and cays such as portions of the Great Barrier Reef. The question whether or not a reef can be treated as portion of territory was discussed by the Law Officers on several occasions during the nineteenth century. In 1862 they discussed the Bermuda Reefs as follows:

'We think that these reefs must be considered as belonging to the territorial jurisdiction incident to the possession of Bermuda, so far at least as that, between them and

¹ C.O. *Law Officers' Opinions*, vol. iv, No. 73. This opinion has obvious implications for Goldie's thesis that Australia may have an historic claim to the pearl beds: loc. cit.

² *Pleadings, Oral Arguments, Documents*, vol. ii, p. 522.

³ The Minister for Commerce and Agriculture, commenting on agitation expressed in the press at Japanese deep-sea fishermen operating in the waters between Queensland and the Reef, issued the following press statement in March 1954: 'The Government has never sought to exercise control, other than of Australian nationals, in respect of the swimming fish industry. In its present state, international law draws a distinction between the resources of the sea bed and the control of swimming fish beyond the accepted territorial limits which, roughly speaking, are three miles off shore': *Fisheries Newsletter*, 14 (1955), No. 3, p. 3: See also Hansard, *H. of Rep.* (1953), No. 1, p. 18.

⁴ *In re Marincovich* (1920), 48 Cal. App. 156; Aaland Islands Convention, *League of Nations Treaty Series*, vol. 9 (1922), Article 2, p. 217; *Alaska Pacific Fisheries v. U.S.* (1918), 248 U.S. 78 at p. 87; *Shively v. Bowlby* (1893), 152 U.S. 1, pp. 47-48, 58; *R. v. Conrad*, [1938] 2 D.L.R. 541; *R. v. Bellman*, [1938] 3 D.L.R. 548; *Fudge v. The King*, [1941] 1 D.L.R. 313; *Ministère Public v. Mallegni*, *Annual Digest*, 1948, Case No. 27. See the Law Officers' opinions collected in Smith, *Great Britain and the Law of Nations*, vol. ii (1935), pp. 222-41.

the island, Her Majesty has a right to prevent the exercise of hostilities, and that if we are right in considering them as part of Bermuda, it would follow that Her Majesty's jurisdiction must extend to three marine miles from that point.'

Again:

'That we are still of opinion that the territorial jurisdiction of Bermuda must be estimated at the distance of a marine league from the North Rock or the outer ledge of the coral reef, or at all events from the rock on the outer edge of that part of the coral reef, which is not covered by the sea at low water.'

They then proceeded to confirm an opinion of the Queen's Advocate of 11 November 1859 which they reinforced by reference to *The Anna*, that each of the cays or rocks in question would have a belt of territorial waters. It was mentioned that the Florida Reefs had always been treated by the United States as an extension of the mainland. In the *Anglo-Norwegian Fisheries* case the United Kingdom suggested that the Law Officers were misled by the chart they used into believing the normal condition of most of the coral reef to be above water.² Presumably this qualification could be applied to the Great Barrier Reef where it is usual for a coral cay of a mile in extent and perpetually dry to be surrounded by a reef of as much again which is submerged at high tide but dry at low tide, with a sharply defined outer ledge. There would seem, however, to be no good reason for rejecting the usual low-tide rule even in circumstances such as these, and in fact the Law Officers in their opinion of 1875 on the Great Barrier Reef³ did not do so. They anticipated the International Law Commission and the Final Act of the Geneva Conference in saying that land not submerged at ordinary high tide, however small, is an island, and that reefs attached to it and dry at low water are part of it. Reefs detached from an island and dry at low water, but not at high water, are not islands and are not taken into consideration in calculating territorial waters.⁴ This opinion, which is relied upon by the Commonwealth Government, was a departure from the principles contained in that of 1863⁵ on the Bahama Banks, where the Law Officers considered it impossible to claim an uninhabited part of the Great Banks as being within British jurisdiction unless it was either enclosed by inhabited cays or was capable of sustaining a fort. In contrast with all these opinions the Queensland Government has been advised that cays dry only at low water are islands within the meaning of the Queensland Coast Islands Act, 1879.

¹ Reproduced in Smith, op. cit., pp. 232 et seq.

² Reply of Great Britain, p. 530.

³ C.O. Law Officers' Opinions, vol. iii, No. 53.

⁴ *Soult v. l'Africain*, 22 Fed. Cases, 1789-1800, Case No. 13179; *U.S. v. Henning* (1925), 7 F (2d) 488; Bases of Discussion, No. 14, p. 54; Aaland Islands Convention, loc. cit., p. 217. Gidel contends the island must be capable of use, op. cit., vol. iii, p. 675, and his view is supported by *Ministère Public v. Mallegni*, loc. cit. (cf. Moore, *Digest*, vol. i, p. 713). International Law Commission Report, Article 10, loc. cit. (A/3159).

⁵ Smith, op. cit., p. 237.

Distinctions are probably valid between groups of reefs and cays exhibiting an affinity with the coast, and thus susceptible of inclusion within it for base-line purposes, and groups detached from it. As to the former there is no Australian practice. It would seem, however, on analogy with the Florida¹ and Cuban² cays that where reefs can be properly regarded as the exterior coastline they are so treated in law. Such is certainly the view of the International Law Commission,³ and it is consistent with the Final Act of the Geneva Conference. Distinctions may also be drawn between navigable and non-navigable channels. Where the intervening waters of isolated groups are navigable it is probable that they are subjected to the régime of straits, even if the segments of territorial waters around each cay overlap to enclose them.⁴ Difficulty arises where the reefs and cays form complicated archipelagos where, often enough, areas of water are enclosed by the arc of segments of territorial waters surrounding the dry areas. Are these pockets State or Federal jurisdiction, State territory or high seas? A 10-mile enclosing line for archipelagos would be a useful criterion, but it is not a rule of international law⁵ and has not been adopted in Australian practice. The International Law Commission avoided the question except in so far as it can be brought within their formula about base lines where circumstances necessitate. What has been said about base lines in relation to bays applies also to reefs.

For the purpose of policing the Commonwealth Fisheries Act, 1952, instructions were issued to the Royal Australian Navy on 22 July 1955 which bear upon the general question. It was stated that foreign nationals were subject to Commonwealth jurisdiction only when fishing in the territorial waters of Commonwealth territories, and not in those of the States. Australians were subject to it on high seas outside State territorial waters and within the limits prescribed by the legislation. The instructions go on: 'The present official Australian legal view is that the waters inside the Barrier Reef are not wholly territorial waters. Only the mainland three

¹ *Middleton v. U.S.* (1939), 32 F (2d) 239; Reply of the United Kingdom in the *Anglo-Norwegian Fisheries* case, loc. cit., vol. ii, p. 536. On 2 April 1889 the Law Officers gave opinion on the case of a British schooner taken off the coast of Florida for a revenue offence within three miles of a cay known as Fowey Rock on which a light was erected. No details of the rock were available and the Law Officers advised that Great Britain should not admit liability: *C.O. Law Officers' Opinions*, vol. iv, No. 147.

² Moore, *Digest*, vol. i, pp. 711, 113.

³ Loc. cit. (A/3159), Article 10. Memorial of United Kingdom in the *Anglo-Norwegian Fisheries* case, loc. cit., vol. i, p. 81; Norwegian Counter-memorial, *ibid.*, paras. 422-5; Reply of United Kingdom, *ibid.*, vol. ii, p. 517.

⁴ Reply of United Kingdom in the *Anglo-Norwegian Fisheries* case, *ibid.*, p. 510; Judgment, *I.C.J. Reports*, 1951, p. 128; *The Düsseldorf*, [1919] P. 245; Azuni, op. cit., p. 254; Calvo, *Le Droit International*, vol. i, ss. 342, 367; Ortolan, op. cit., pp. 145, 156.

⁵ C. 74, M. 39, 1929 V., p. 51. *Annuaire de l'Institut de droit international*, 1 (1927), pp. 78-81; (1928), pp. 646-7; Gidel, op. cit., vol. iii, pp. 718, 725; Australia took the view in 1929 that a group should not be treated as a whole but that each island dry at low water should have its own territorial belt: loc. cit., C. 74, M. 39, 1929 V., p. 118.

mile belt and the waters to a distance of three miles around each island come within this category. International law recognises that every island has its own territorial water. 'Territorial waters are the boundary dividing the areas of State and Commonwealth control.' Considering both the unresolved ambiguities in Federal and State practice on this question and the mosaic of jurisdictions it is difficult to see how a fisherman, arrested for an offence committed within a complex of reefs and cays, could be successfully prosecuted under either legal system without the strictest hydrographical and surveying evidence as to the *situs* of his offence.

IV. EXTRA-TERRITORIAL MARITIME JURISDICTION OF THE AUSTRALIAN STATES

Can the Australian States, or for that matter any of the maritime colonies, legislate for fisheries and other maritime activities beyond their boundaries, whether they be low water or territorial waters? And if they can is their legislation limited to their own residents? If it is so limited, does this mean that Victorian fishermen can operate without restriction in South Australian waters while South Australians can only do so subject to the restrictions of South Australian legislation? The question is highly complex, and this treatment of it must necessarily be somewhat superficial, assuming much that is by no means established beyond doubt, and doing no more than hint at the constitutional implications.¹ Colonial parliaments derive their competence from the Imperial, and the grants of power are usually expressed to be for the 'peace, order and good government' of the colony. This expression, or analogous words, is found in the grant to every Australian colony. For more than a century the deduction has been made that by the form of the grant colonial competence is restricted to intra-territorial legislation.² In recent years the existence of the doctrine of extra-territorial incompetence, as the restriction is usually termed, has been challenged more than once,³ but it was emphatically adhered to throughout the second half of the nineteenth century by both English and Colonial courts, and developed in the opinions of the Law Officers. Its basis is

¹ It is proposed to examine the whole question more fully on another occasion.

² Kennedy and Schlossberg, *The Law and Custom of the South African Constitution* (1935), p. 98; Keith, *The Sovereignty of the British Dominions* (1929), p. 225; Fry, *The International and National Competence of Australian Parliaments to Legislate in Respect of Extra-territorial Crime* (1947), p. 55; Tarring, *Law Relating to the Colonies* (1906), p. 131. Lefroy, *Canada's Federal System* (1913), p. 102 argued that the doctrine is 'merely a question of the construction of the Constitution which the Imperial Government or parliament has conferred'. See for earlier theorizing *Regina v. Call ex p. Murphy* (1881), 7 V.L.R. 121; *Ray v. M'Mackin* (1874), 1 V.L.R. (L.) 274; *Ex p. Allen* (1881), 7 V.L.R. 248. It was held that the Merchant Shipping Acts of 1854 and 1862 did not cover the situation. But now see Merchant Shipping Act of 1894, s. 478; *Hodge v. R.* (1883), L.R. 9 A.C. 117; *Powell v. Apollo Candle Co.* (1885), L.R. 10 A.C. 282; *Riel v. R.* (1885), L.R. 10 A.C. 675.

³ e.g. Salmond in *Law Quarterly Review*, 33 (1917), p. 127.

clearly one of policy: Relationships with foreign nationals outside the colonial boundaries raised questions of international law affecting the Imperial Government, and the latter could not be compromised by possibly irresponsible colonial legislation. It may well be that the Law Officers in elaborating the doctrine were originally doing no more than applying to colonial parliaments their views on the limitation imposed on the constitutional competence of the Imperial Parliament by international law.¹ In the earliest available opinion on colonial extra-territorial jurisdiction the Law Officers do no more than hint at the tangled skein of international law and constitutional law conceptions which dictated their thinking. They said² in reference to British Guiana in February 1855: 'We conceive that the colonial legislature cannot legally exercise its jurisdiction beyond its territorial limits—three miles from the shore—or, at the utmost, can only do this over persons domiciled in the colony who may offend against its ordinances even beyond those limits, but not over other persons.' This opinion followed and was influenced by one given by the Queen's Advocate in August 1854, on the question within what distance of the coasts of the Falkland Islands whale and seal fishing by foreign nationals might be supervised: 'Her Majesty's Government will be legally justified in preventing foreigners from whale and seal fishing within three marine miles (or a marine league) from the coasts, such being the distances to which, according to the modern interpretation and usage of nations, a cannon-shot is supposed to reach.'³

It is to be noticed that the opinion of 1855 is not one of colonial extra-territorial incompetence: jurisdiction over colonial residents is not seriously questioned, and the doctrine as it first emerged seems therefore to have been one of incompetence over non-residents. This is clear from the advice given by the Solicitor to the Board of Customs on a hovering provision in Victorian legislation of 1861. Acting upon this the Board reported to the Treasury that the colonies did not have power to impose penalties on persons other than the inhabitants thereof for acts committed beyond three miles from the shore, and that the Victorian law should be amended in so far as it affected ships and the inhabitants of the mother country or the other colonies. Following this the Committee of Privy Council for Trade questioned if the English hovering legislation should be retained since it might be adopted as the model by Colonial legislatures, so involving the Imperial Government in international liability.⁴ Again, it is

¹ Derived from perhaps, *Lopez v. Burslem* (1843), 4 Moo. P.C. 300 at p. 305; *The Zollverein* (1856), 1 Swab. Adm. 96 at p. 98. See Jenkyns, *British Rule and Jurisdiction beyond the Seas*, p. 123 et seq.

² Harding, Cockburn and Bethell: Forsyth, *Cases and Opinions on Constitutional Law* (1869), p. 24. Guiana repealed the law. The opinion cannot now be traced.

³ *Ibid.*, p. 25.

⁴ Masterson, *op. cit.*, p. 140 et seq.

clear that considerations of international law interweave with Imperial policy in producing the rule. In 1860 Victoria legislated to create a colonial navy and equipped H.M.S. *Victoria* for operations on the New Zealand coast during the Maori Wars. On 21 December 1860 the Law Officers¹ reported that the Act:

'Would confer upon vessels equipped under the Colonial Act the legal character of British vessels of war within the limits of the territorial jurisdiction of the Colony, i.e. within three miles of the shores, but that beyond these limits such vessels would not be entitled to this character . . . the "*Victoria*" is now employed as a vessel of war without the territorial waters of the Colony, but in the event of her being brought into conflict with a vessel of any foreign State conveying stores or ammunition to the rebels in New Zealand, for instance, we think it very doubtful whether she could claim to be recognized as a British man-of-war, and to possess the privileges incident to international law to such a vessel, as, for instance, whether captures made by her would be liable to be condemned as prizes.'²

They accordingly recommended disallowance.

Shortly after this opinion was given it seems to have been taken for granted that a colony could not exercise jurisdiction over even its own residents on ships registered or commissioned in the colony once outside territorial waters. In time this was enlarged into the proposition that colonial legislatures were incompetent even in respect of their own residents over a wide category of events occurring extraterritorially.³ Eventually, in 1891, in *MacLeod v. A.-G. for New South Wales*,⁴ a case that could not be more obscure in argument or more controversial in its implications, the Privy Council approved, or appeared to approve, of the view that no colony could legislate at all in respect of acts occurring outside the colony. This was the apogee of the doctrine of colonial extra-territorial incompetence. As the colonies matured so the Privy Council strove to find sufficient territorial connexion to validate colonial legislation with extra-territorial implications.⁵ What could not be done directly the courts permitted to be done indirectly. For example, an Act making it an offence to come within the colony after having committed an offence on the high seas was held to be valid. Although the Act might be directed to an extra-territorial event, such as the breaking of customs seals on the high seas,⁶ it would be valid if it

¹ Harding, Bethell, Atherton, Phillimore and Collier.

² *C.O. Law Officers' Opinions*, vol. i, No. 46.

³ *Regina v. Call ex p. Murphy* (1881), 7 V.L.R. 121; *Ray v. M'Mackin* (1874), 1 V.L.R. (L.) 274; *Ex p. Allen* (1881), 7 V.L.R. 248; *Hodge v. R.* (1883), L.R. 9 A.C. 117; *Powell v. Apollo Candle Co.* (1885), L.R. 10 A.C. 282; *Riel v. R.* (1885), L.R. 10 A.C. 675; *Low v. Rutledge* (1870), L.R. 6 Q.B. 1 at p. 20; *Ashbury v. Ellis*, [1893] A.C. 339; *R. v. Meikleham* (1905), 11 O.L.R. 366; *R. v. Brierly* (1877), 14 O.R. at p. 531; *In re Criminal Code relating to Bigamy* (1897), 27 S.C.R. 482; *Deacon v. Chadwick* (1901), 1 Q.L.R. 346; *Bank v. Orrell* (1878), 4 U.L.R. 219. On the general question see Lefroy, *Legislative Power in Canada* (1897), pp. 328-33; Todd, *Parliamentary Government in the British Colonies* (1894), p. 178; Hodgkin's *Provincial Legislation* (1867-95), p. 7.

⁴ [1891] A.C. 455.

⁵ e.g. *A.-G. for Canada v. Cain*, [1906] A.C. 542.

⁶ *P. & O. Co. v. Kingston*, [1903] A.C. 471.

attached criminality in form to an intra-territorial event, namely, physical presence within the colony. Sir John Salmond's impatience with the absurdities of the situation is understandable. He exclaimed:¹ 'Surely the circumstance that it can be evaded and brought to nought . . . —that its only practical effect is to drive colonial legislatures into indirect paths to the end which they are forbidden to seek directly—is sufficient to cast the gravest doubts on the claim of this rule to any place at all in the fabric of the Imperial constitution.' Supporters of the Salmond view argue that as the colonies matured politically the doctrine of extra-territorial incompetence was in process of evaporation, and that it virtually disappeared in *Croft v. Dunphy*² in 1932. This contention, broadly stated, must be viewed with caution. *Croft v. Dunphy* dealt with the legislative powers of a Dominion, not of a colony or the Australian States. In 1929 Dunphy's schooner was arrested by Canadian customs officers outside Canada's territorial waters for an offence committed extra-territorially against legislation of the Dominion. Dunphy sued for the return of the schooner on the ground that the Statute, in so far as it authorized extra-territorial action by Canadian instrumentalities against persons and things outside Canadian territory, was unconstitutional. Such action, it was argued, was not for the peace, order and good government of Canada. The Privy Council disposed of the contention in summary fashion, and one must read a good deal into the case to ascertain its full import. It was accepted that the formula 'peace, order and good government' gives a colonial parliament powers as plenary as those of the Imperial Parliament. As for customs legislation, international law acknowledges the competence of sovereign States to control hovering in the contiguous zone, and in constitutional law 'their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign State'. This description of Canada as a fully sovereign State is important. It was accepted before the Statute of Westminster, and certainly in the Balfour Declaration in 1926, that the Dominions were juridically distinguishable from colonies, and enjoyed an autonomy in policy making which the latter did not, and which was inconsistent with the survival of the territorial concept of their legislative power. It is arguable that the Statute of Westminster, in granting extra-territorial competence, was merely declaratory. If this is so then *Croft v. Dunphy* has implications only for the Dominions and has no direct relevance to the colonies and doubtful relevance to the Australian States.³

¹ In *Law Quarterly Review*, 33 (1917), p. 127.

² [1933] A.C. 156.

³ See the discussion of the case by the New Zealand Court of Appeal in *Woolworth (N.Z.) Ltd. v. Wynn*, [1952] N.Z.L.R. 496. It is interesting to note that the Law Officers in their opinion of 21 December 1899 on the Commonwealth Constitution were doubtful if the doctrine of extra-territoriality would apply to the Commonwealth: *C.O. Law Officers' Opinions*, vol. v, No. 243.

In relation to the competence extra-territorially of the Australian States the High Court of Australia has fluctuated between the extreme positions taken by the Privy Council in 1891 and in 1932. Most of the cases have concerned competence to tax, and broadly speaking it has been admitted that a person domiciled in an Australian State is subject to that State's taxation even in respect of property outside; residence is the territorial connexion.¹ Why the same principle should not apply to events as well as to property beyond the jurisdiction has never been made clear, and the more closely the matter is examined the more apt becomes Lord Sankey's description of the doctrine of extra-territorial incompetence as one of 'somewhat obscure extent'.² It is clear that the mere presence of an element of extra-territoriality does not invalidate a Colonial Act, but what degree of territorial connexion must exist is by no means clear. In some Australian cases the most elaborate analysis of territoriality has been made, but the touchstone remains as elusive as ever it was. It is argued that legislation is valid which has a substantial connexion with peace, order and good government. But the question is precisely, what is a substantial connexion? Evatt J.³ has sought to sidestep the question by arguing that extra-territoriality disappeared with *Croft v. Dunphy*: that extra-territorial competence is an integral feature of self-government, and that 'the legislative powers of the Australian State legislatures are . . . of precisely the same general nature and quality as those of the Commonwealth Parliament'. This last proposition is open to serious challenge. Desirable as it may be to conclude that the constitutional competence of the States has expanded commensurately with the status of the Commonwealth, this result has been acknowledged neither in theory nor in practice by the States themselves, which still assume that they can exercise no direct jurisdiction even over their own residents outside territorial waters. If we conclude, therefore, that the Australian States are still encumbered with the doctrine of extra-territorial incompetence, it remains to examine whether their assumption that they cannot control the fishery activities of their own resident fishermen has any foundation in law.

¹ The Tax Cases are *Commissioner of Stamps v. Weinhold* (1915), 20 C.L.R. 531; *Hughes v. Munro* (1909), 9 C.L.R. 289; *Commissioner of Stamp Duties (N.S.W.) v. Millar* (1932), 48 C.L.R. 618; *Commissioner of Taxes v. Union Trustee Co. of Australia*, [1931] A.C. 258; *Commissioner of Stamp Duties (N.S.W.) v. Perpetual Trustee Co. Ltd.* (1926), 38 C.L.R. 12; *A.-G. v. Australian Agricultural Company* (1934), 34 S.R. (N.S.W.) 571; *Vicars v. Commissioner of Stamp Duties of New South Wales* (1945), 71 C.L.R. 309; *Trustees Executors and Agency Co. Ltd. v. Federal Commissioner of Taxation* (1933), 49 C.L.R. 220; *Commissioner of Stamps (Q) v. Counsell* (1937), 57 C.L.R. 248; *Jackson v. Federal Commissioner of Taxation* (1920), 27 C.L.R. 503; *Murray v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 134; *Federal Commissioner of Taxation v. Munro* (1926), 38 C.L.R. 153; *Broken Hill South Ltd. v. Commissioner of Taxation* (N.S.W.) (1936-7), 56 C.L.R. 337; *Johnson v. Commissioner of Stamp Duties*, [1956] A.C. 331.

² In *British Coal Corporation v. The King*, [1935] A.C. 500 at p. 520.

³ *Trustees Executors and Agency Co. Ltd. v. Federal Commissioner of Taxation* (1933), 49 C.L.R. 220; also in *Proceedings of the Australian and New Zealand Society of International Law*, 1 (1933), p. 48.

Although opinions have been given to some at least of the Australian State governments favouring an expanded maritime jurisdiction on the dubious authority of *Croft v. Dunphy* none has in fact assumed wider powers than those granted in the British Merchant Shipping Act, and, notably in the case of fisheries, none has made any effort to enforce legislation beyond the territorial limits of the States which are assumed to be the three-mile limit. Until 1891 there was no binding judicial decision which limited colonial jurisdiction over the colony's own 'subjects' to intra-territorial actions, and in the case of fishery there was at least a trend of opinion in favour of competence in respect of such persons outside the three-mile limit. In *Rhodes v. Fairweather*¹ the master of a ship registered in Scotland was prosecuted for violation of Newfoundland's closed season on seals. The owner and master and several of the crew resided in Scotland, but the vessel used St. John's as a base. The seals were taken outside the three-mile limit. Carter C.J. held the legislature of Newfoundland to be incompetent over 'a ship of the British nation'. Little J. agreed, adding that a colony is only a part of the nation and 'cannot exercise these powers which pertain alone to the nation or State creating it'. Pinsent J. vigorously dissented and the logic of his argument is incontestable:

'I take it to be a sound doctrine as a general proposition, that the limits of colonial jurisdiction extend to only three miles from the shore, and that a colonial legislature cannot confer a jurisdiction beyond its territorial limits, but here the exercise of the jurisdiction is upon persons and things within the limits, although it may be for acts done in violation of our law outside those limits. . . . We have here to guard against confounding the territorial limits of the government with the power of legislation over persons and things, between which there is no necessary coincidence, except as to the place of putting the law in execution against persons who owe subjection to it.'

A sufficient territorial connexion was constituted, in his opinion, by the use of Newfoundland as the vessel's base of operations. In *The Queen v. Delepine*² it was held that Newfoundland had no jurisdiction beyond territorial waters, but in this case the vessel in question and its master were foreign and the territorial connexion with Newfoundland was even more tenuous.

Following the first of these two cases the Colonial Office sought the opinion of the Law Officers who reported on 27 December 1888:

'We are of opinion that, unless specially authorised by Imperial legislation, it is not within the power of the Colonial Legislature to legislate generally for the regulation of fisheries outside the three mile limit.

'The Colonial Legislature could make laws for the peace, order and good government of the Newfoundland fisheries, and, under that power, might control the crews

¹ (1888) *Newfoundland Decisions*, p. 321.

² (1889) *ibid.*, p. 378. Generally see also *The Ship Frederick Gerring Jr. v. The Queen* (1897), 27 S.C.R. 271; *The Farewell* (1881), 7 Q.L.R. 380; *Deacon v. Chadwick* (1901), 10 L.R. 346.

of ships engaged in such fisheries, even though they might be registered elsewhere than in the colony. Indirectly the colony might thus obtain jurisdiction, in respect of acts done outside the territorial waters of Newfoundland, in the case of ships which had come within the provisions of the Colonial Statute, as, for instance, by taking without a licence.¹

Two Law Officers' opinions serve to disclose only a little more precisely what was in their minds, one given on 18 March 1887 in relation to Shark Bay,² and the other on 10 August 1888 concerning fishing in the Arafura Sea. The latter opinion was to influence greatly the constitutional practice of the Australian States. Pearl-ling vessels operating from Singapore were excessively exploiting the pearling grounds of the Arafura Sea near the coast of Western Australia, and having equipment (including diving suits) superior to that of the colony's own resident fishermen gravely prejudiced the latter's economic position. Western Australia duly legislated for the matter and the Governor gave the Royal Assent. Powers of visitation and search were limited to territorial waters but control was to be exercised by the indirect means of attaching conditions to the use of Western Australian port facilities. Section 2 required that any ship 'employed in any pearl-shell fishery of the Colony' was required to take out a licence and (Section 8) pay customs duties upon all uncustomed stores on board although they were not landed. Section 3 provided that the ship's papers were to be returned only after the master accounted for all pearl shells 'gotten since the granting of the licence' and paid export duty on them. The Law Officers reported that:

'The course taken by the Colonial Government in levying customs and export duties under the Act can be legally upheld, both as regards ships which fish entirely within three miles of the shore, and as regards ships which fish partly within and partly beyond the three mile limit. In our opinion the provisions of the Act cannot be properly enforced against the vessels mentioned unless such vessels have taken a licence, or have in fact been used or employed by persons engaged in a pearl shell fishery within the three mile limit.'³

Eight days later instructions were dispatched to the Governor informing him that no attempt was to be made 'to enforce the law against any vessels which remain more than three miles from the coast and fish beyond that

¹ *C.O. Law Officers' Opinions*, vol. iv, No. 134.

² Above, p. 242, n. 2.

³ *C.O. Law Officers' Opinions*, vol. iv, No. 127. A similar policy underlies earlier opinions on the competence of Hong Kong to make ordinances conferring jurisdiction in respect of piracy. On 18 March 1867 the Law Officers reported that 12 & 13 Vict. c. 96 authorized piracy jurisdiction in the ordinary courts but not in exceptional courts where the acts occurred outside the colonial limits: *C.O. Law Officers' Opinions*, vol. ii, No. 461. On 12 October 1868 they reported favourably on an ordinance which made it an offence to be found within the jurisdiction 'under circumstances which render it in some degree probable that he has committed a crime outside that jurisdiction'. *Ibid.*, No. 532.

distance, and do not come into Colonial waters except to obtain supplies or for other purposes'.

'To state the position briefly, this Act, like any other Colonial law, cannot be applied more than three miles from the coast, and if it is necessary to regulate the Pearl Shell Fishery as carried on beyond that limit, it will be necessary to have recourse to the Federal Council.'¹

It may well be that the later Privy Council decisions reversed the implications of this statement of law, and qualified the rule apparently laid down in *MacLeod's* case by establishing that the doctrine of extra-territorial incompetence is not to be read in a sense which would diminish the power to legislate for the peace, order and good government of the colony.² A fisherman operating off the territory is in a relationship to the territory that cannot fail to bear upon its peace, order and good government, and if it is legitimate to exercise coercive power extra-territorially³ to make deportation effective,⁴ it may be equally legitimate to exercise it to conserve natural resources. The Australian States, however, have accepted that they can only prosecute for fishery offences on the high seas by attaching criminality, in the manner suggested in the above opinions, to entry within State territory after having done the act. This practice has received the approval of the Full Court of the Supreme Court of New South Wales in the unreported decision in 1937 of *Ex Parte Caminite, re O'Toole & Anor.* The appellant had been convicted under section 116 of the Fisheries and Oyster Farms Act, 1935, which makes it an offence to have in one's possession, premises or boat any undersized fish. He had caught his fish off the coast of Tasmania on the high seas and he argued that the limitation 'caught in New South Wales' should be read into the section.⁵ The Court refused to accept this submission and instead read into the section the words 'possession in New South Wales'. Such a legislative device is effective to enforce State fishery policy on the coastal State's own inhabitants but it discriminates against them because it leaves uncontrolled the fishing on the high seas of residents of other nearby States. The resulting pattern of enforcement conforms with the doctrine of extra-territorial incompetence, but its economic consequences are most artificial. In practice it means that a State's own fishermen are penalized to the advantage of poachers from another State. It would not be surprising if the State's own fishermen shifted their base to the other State while fishing the same waters, and by so doing deprive their home State of the economic advantages of their coastal fishery. To avoid this the

¹ *Papers of the Legislative Council of Western Australia* (1888), 2nd Sess., No. 26.

² *P. & O. Co. v. Kingston*, [1906] A.C. 542.

³ Harrison Moore, *The Australian Constitution* (1904), p. 270.

⁴ *R. v. Secretary of State for Foreign Affairs ex parte Greenberg*, [1947] 2 All E.R. 550.

⁵ As was done in *Olsen v. Paxino*, 22 W.N. 199.

States have to call on the Commonwealth to enact and enforce the necessary legislation, so subordinating State to Federal policies. Criticism may well be directed to the survival of colonial anachronisms which have long become divorced from the policies that generated them, and which confronts the States with the alternative evils of legislative incompetence to protect their own legitimate interests and of an ever advancing legislative power of the Commonwealth. From the point of view of economic policy the present haphazard distribution of competence between the Commonwealth and the States is not desirable, and this might well promote pressure in the future to deprive the States of fishery jurisdiction altogether.

Conclusion

At the present time it is difficult to state with clarity the effect of an expanding and changing international law of the sea upon disputed Federal-State maritime claims. The Commonwealth Government in the case of Australia has the power to declare Australia's viewpoint on matters of international law and to make new claims on her behalf and, this being so, what would be the effect of such a declaration on the Federal-State boundary? Obviously the first consideration in any judicial process in which the question is raised is the State's rights guaranteed under the Constitution. As a starting-point it might be considered that the States have at least as a minimum the colonial boundaries as they existed before federation, which is why so much attention has had to be directed in this paper to nineteenth-century doctrine and practice. But how far is nineteenth-century doctrine and practice binding upon an Australian court when the international law which prompted it has since materially altered? How far is an Australian court bound by *R. v. Keyn* in the event of Australia participating in international agreement to the effect that a State has sovereignty over its territorial waters? It is difficult to predict what in fact the court would do, but there is at least an argument that, since the question is one of the minimum boundaries of the State, the year 1900 is the decisive year, and changes in doctrine on the juridical nature of the territorial belt since then are irrelevant. If *R. v. Keyn* is to be impeached as an authority this could only be done, on this argument, by establishing that it proceeded upon what was a wrong view of international law in 1876. However, changes in doctrine on the nature of territorial waters is only one aspect of the problem. The curious situation could, and indeed does, arise where the Commonwealth Government internationally claims either *more* or *less* than the State Government claims as its Crown lands. Just how a court would resolve the resulting conflict of international and constitutional law is by no means clear. As this paper has attempted to indicate there are three main areas

within which such a conflict could arise: Firstly, in determining to which of two competing governments the territorial belt is to be attributed, and just how extensive that belt is; secondly, how far off the mouths of bays and rivers the territorial belt is to be drawn, or in other words, just where is the closing line dividing inland from territorial waters, and, thirdly, the question of drying rocks and complexes of islands.

Where the Commonwealth claims *more* than the State as national territory or territorial waters of Australia the problem then is to determine which of the two governments has under the Constitution competence to administer the area in question. It is reasonably clear that where the Commonwealth has defined the national boundary, either in specific instances by executive action or by general statements of its views on international law, an Australian court, provided there is no derogation from State rights, would be entitled to treat the definition as decisive. The question then would be, has the Commonwealth extended its boundary by the addition of new territory, or merely defined the boundary of its already existing territory? If the former, a new problem arises, whether or not the acquired territory is to be attributed to the Federal or the State Government. If the latter, the Commonwealth has perhaps purported to define the boundary of the State as well as the national boundary. Suppose, for example, the Commonwealth declares that in accordance with contemporary views of what international law allows, Australian territorial waters now extend six miles. A court, when called upon to decide what effect such a declaration has upon State jurisdictional rights, has a number of choices. It might act upon the theory that State boundaries were frozen as at 1900 when only three miles of territorial waters were allowed. The result would be to partition the 6 miles between the State and Federal governments in the ratio of 3 to 6. Such a partition would be illogical in practice, and it may be tested by analogy offered in the case of bays: suppose the Commonwealth declares that in accordance with the Final Act of Geneva a base line is to be drawn from certain points to enclose indentations previously regarded by State and Federal authorities and by the courts as high seas. There can be no doubt that the waters enclosed, being internal waters, would be State property. It would seem then that the State boundaries, though fixed at a *minimum* in 1900, are susceptible of automatic expansion to a *maximum* merely at the instance of the Commonwealth Executive, and this must be as true of territorial waters, supposing they are within the State boundaries, as of inland. A State might thus suddenly find itself exercising legislative jurisdiction over an area it never supposed to be within its competence. By the same token, the Commonwealth Parliament might find itself excluded from the area for some specific legislative purposes. The alternative, so far as territorial waters are concerned, is to conclude that they are not

State territory at all, and the very flux in the law and the consequent flexibility of the boundary between territorial waters, internal waters, contiguous zones and high seas, offer a good policy argument for so doing. *R. v. Keyn* could thus be a useful peg on which to hang a policy decision not very different from that in the tidelands cases.

To take the converse situation, the Commonwealth might, by general or specific declaration, or by officially adhering to some international convention or to some international declaration of international law, draw the national boundary *within* a line claimed by the State as its boundary. This could occur in the case of bays, and perhaps also in the case of drying rocks of the Great Barrier Reef. Does the Commonwealth's action bind the court to recognition of the line so drawn? What the court is called upon to do is to define the boundary within which State exclusive powers operate; primarily it is making a constitutional decision, and international law and the Commonwealth's views of it cannot be decisive. It is difficult to see how a State could be divested of any of its territory, and it may be that a Commonwealth declaration or certificate drawing the national boundary within a line established as the State boundary in 1900 would be ineffective. This may be true as much in the case where the State boundary line is only implicitly designated as in the case where it is explicitly designated. The question whether the State can independently of the Commonwealth claim the *maximum* boundary allowed by international law at the present time is more complex. It is illustrated by the pretensions of California to define its maritime boundary within the limits allowed by the *Norwegian Fisheries* case but outside those to which the Federal Government had committed itself at least in general policy. The thesis of State sovereignty lends substance to such a claim, and Federal executive or legislative action might be constitutionally powerless to resist it. On the other hand, considerations of international responsibility vest some measure of paramountcy in a Federal Government and might inhibit the States from making claims which the latter does not recognize. Which of these two approaches would be taken is difficult to predict.

The more usual situation that would confront an Australian court is where neither the national nor the State boundary has been specifically defined by legislative or executive action, but where a litigant claims that either Commonwealth or State legislation is exclusive in a particular area. What the court here is called upon to do is to declare whether the area is within or without the jurisdiction of the State, and if jurisdiction is coterminous with territory, within or without the State boundary. Suppose, for example, a fisherman is prosecuted for a breach of State fishery legislation within a bay at a point more than three miles from either shore. He will argue that the offence was committed extra-territorially, and the State has

no extra-territorial fishery competence. The prosecution will argue that the area is a bay, and will, of course, refer to the latest international law decisions and opinion as to what constitutes a bay. The Commonwealth will be impleaded and will perhaps, depending on the policy considerations that move it, argue that (*a*) international law does not allow more than a six-mile closing line, or (*b*) if it does the Commonwealth has either (i) not claimed more, or (ii) in practice claimed less. It may put in a certificate in an effort to determine the question itself. The court is then concerned to assess the binding nature of the certificate and, if it finds the certificate not to be decisive, will examine the argument. If it finds that there is no substance in argument (*a*), it would be entitled, so it may be submitted, to define the limits of State territory upon its own views of international law. It will then proceed to argument (*b*) and here its reaction is more difficult to predict. The fact that the Commonwealth has failed to claim more than a six-mile closing line would not prevent the court from making its own determination, but it is not unreasonable to suppose that a court would be strongly influenced by actual practice. It was practice and not formal legal act that led the courts in the nineteenth century to recognition of the three-mile limit. Just how strongly the court will be influenced will depend upon the evidence of practice available to it. If executive action is no more than a statement of the Australian Government's views on international law either in the form of instructions to its agents or in replies to questionnaires of the International Law Commission (which might be cited as the Reports of the Permanent Mandates Commission have been cited), the court will be influenced by such action, but to what extent one cannot say.

Indeed, a ready answer to these questions is not to be expected. The impact of international law upon federal constitutional law is no doubt frequent and significant, but so far judicial decision in the areas where it occurs has been tentative, and no real doctrine or theory has emerged. In the so-called tidelands cases the United States Supreme Court did indeed attempt some doctrine, but it was no more than a superstructure to an essentially policy decision. At bottom the problem is one of collision between two incompatible doctrines, the sovereignty of the constituent elements in a federal system, and their lack of responsibility in international relations. The way a court will approach the problem of maritime boundary will in the last resort depend upon its attitude to federalism as a theory and system of government.

WAIVER OF IMMUNITY

By E. J. COHN

THE English doctrine on the immunity of sovereign States before national courts stands today in a position of unsplendid isolation. The rule of absolute immunity which the English courts have adopted is nearly everywhere else being replaced by that of relative immunity. In most of the leading countries immunity of sovereign States no longer covers *acta gestionis*. It is restricted to *acta imperii*. Even in the fields in which it is allowed to persist the operation of immunity is limited by the readiness of the courts to presume that contracts concluded by a foreign State contain an implied submission to jurisdiction. The position now is that the English courts accord to foreign States immunity to an extent to which no other State would accord immunity either to this country or to any other State.¹

This undesirable position has come about not by way of a systematic consideration of the pros and cons of granting immunity. Nor is it the consequence of structural differences between the law of this country and the law of the great majority of foreign legal systems. It is submitted that it is largely the result of an unfortunate sequence of entirely fortuitous events and of the fact that the particular background of the first case in which the English courts ever had an opportunity of considering the question of waiver of immunity has not been taken into consideration by courts or counsel. Whether or not the courts have still the means of finding a way out of the fetters which they have created for themselves, it is believed that an analysis of the English development and its comparison with the position in the continental European countries may be of some use, even if only as a reminder of the fact that the rules of English law are not axiomatic truths.

If on the continent of Europe today the rule of relative immunity holds sway, this is due to the fact that the courts were able to rely on that age-old cure for all traditional legal ills—the implied contract of the parties. The doctrine of absolute immunity worked no injustice in the time of the patriarchal State: the activities of this State hardly ever fell to be considered by foreign courts. It began to prove awkward in the time of the

¹ Summaries of the legal position in the various countries have been given by Lauterpacht in this *Year Book*, 28 (1951), p. 394 et seq.; Lalive in *Recueil des Cours*, 3 (1953), p. 209 et seq.; Gmür, in *Schweiz. Jahrbuch für int. Recht* (1950), p. 9 et seq.; Schnitzer in *Internationales Privatrecht* (4th ed., 1958), vol. ii, p. 830 et seq.; Lemonon, in *Annuaire de droit international* (1952), vol. 44, Part I, p. 37 et seq.; Schmitthoff, 'Sovereign Immunity in International Trade', *I.C.L.Q.* 7 (1958), p. 452 et seq. The only countries whose views largely agree with that adopted by English law are Soviet Russia and her satellites; see Seidl-Hohenveldern in *Internationales Recht und Diplomatie* (1957), p. 327 et seq. Dr. Schmitthoff's article appeared after the manuscript of the present article was completed.

budding welfare State. It became impossible when the hour of the trading State of today began. But the very nature of the activities of the trading State provided the remedy: these were activities with respect to which it was possible to impute to the State a 'conclusive' or at least a presumed intention of submission to the jurisdiction. Henceforth the way to a satisfactory solution was clear: all that had to be done was to establish types of cases in which the intention to submit to jurisdiction was to be implied. Once this was safely accomplished, the courts began to give less and less attention to the question whether there was any real intention to submit or not. The doctrine of submission to jurisdiction had discharged its historical function: it had enabled the courts to bridge the gap from absolute to relative immunity.¹

The English courts unfortunately did not find the way to this bridge. The reason is that at the time and in the circumstances of the first case in which the question of waiver had to be considered in England, the Court was not in a position to have recourse to the doctrine of implied waiver and thus could not gain access to this convenient bridge.

This first case is that of *Mighell v. Sultan of Johore*.² The plaintiff in this case claimed damages for breach of a promise to marry allegedly given by the defendant. She alleged that the Sultan had lived for many years in this country under the assumed name of 'Albert Baker'. The Sultan pleaded immunity from jurisdiction. The plaintiff replied that by living incognito under an English name here for a long time, the Sultan had impliedly submitted to the jurisdiction. The plea of immunity was upheld by all three judges in the Court of Appeal. They held that the facts were not sufficient to warrant the assumption that the Sultan intended to submit to the jurisdiction. If that had been all, the case would have held little interest for posterity. Sovereigns who live incognito in another sovereign's territory do not constitute a pressing legal problem. However, juristic zeal led two of the learned Lords Justices into buttressing up their decision by a further argument. This is the argument which has proved an unsurmountable obstacle to a progressive development of the English doctrine of sovereign immunity. In the view of Lopes L.J. and Kay L.J. there was only one mode in which a foreign sovereign could submit to the jurisdiction of an English court. This mode consisted in 'a submission in the face of the court, as for example by appearance to a writ'. In support of this proposition both learned judges relied on a passage from Vattel which, in the English translation quoted in the Judgments, reads as follows:

'On his [i.e. the sovereign's] making himself known he cannot be treated as subject

¹ Gmür, *Gerichtsbareit über fremde Staaten* (Zürich, 1948), p. 117 et seq., brings an impressive list of the decisions and writings in which implied waiver has been relied on for the purpose of restricting the effect of state immunity.

² [1894] Q.B. 149.

to the common laws. For it is not to be presumed that he has consented to such a subjection and if a prince will not suffer him in his dominion on that footing, he should give him notice of his intention.'

There can be no question that this passage was most apposite to the problem actually before the Court—i.e. that of the prince who incognito stayed on the territory of another sovereign. Counsel was entirely right in relying on it in this connexion. The classical writers living at a time when sovereign princes could be numbered by the hundreds, if not by the thousands, had good reason to consider this problem. In the passage cited, Vattel had done exactly this and in his view incognito residence did not constitute an implied waiver. A Swiss Court in modern times arrived at the same conclusion.¹ But on the quite different proposition in support of which Lopes L.J. and Kay L.J. quoted him, Vattel has nothing to say. He merely says that living incognito is insufficient to constitute waiver. He does not say what would be required in order that waiver may be found to have been declared.

It seems to be a fact that until the decision in *Mighell v. Sultan of Johore* no court and no writer anywhere in the world had ever arrived at the conclusion at which the Court of Appeal arrived in that case. This may seem startling. But it finds an explanation in the fact that under the Rules of the Supreme Court as they stood at the time no other view than that adopted by the two learned judges was possible. This point seems to have been entirely overlooked in previous discussions of the topic.

The jurisdiction of English courts is circumscribed by the rules relating to service of a writ outside the jurisdiction which are contained in Order XI. This Order contains today rule 2A which reads as follows:

'Notwithstanding anything contained in Rule 1 of this Order the parties to any contract may agree (a) that the High Court of Justice shall have jurisdiction to entertain an action in respect of such contract, and, moreover or in the alternative, (b) that service of any writ of summons in any such action may be effected at any place within or out of the jurisdiction on any party or on any person on behalf of any party or in any manner specified or indicated in such contract.'

But when *Sultan of Johore's* case was before the Court of Appeal this rule was not yet in force. It was inserted into the Rules of the Supreme Court as late as in 1920.² When *Sultan of Johore's* case was before the Court of Appeal it was not possible for any party, whether a private individual or a sovereign State, to submit to the jurisdiction in any form other than by a submission in the face of the court. There was no difference in this respect

¹ The King of the Netherlands travelled incognito in Switzerland. He was fined in respect of some trifling incident by the Court at Clarens. When his identity was established, the Court set the fine aside and recognized the King's immunity; see Bonfils-Fauquille, *Lehrbuch des Völkerrechts* (German version) (3rd ed., 1904), p. 351, n. 1.

² R.S.C. (No. 3), 14 July 1920.

between sovereign States and private individuals. The two learned judges, when stating that a submission in *facie curiae* was required, did not state a rule of international law or a rule relating to sovereign States exclusively. They stated a rule of the English law of civil procedure, which applied to any litigant before the English courts.

The rule in *Mighell v. Sultan of Johore* has been so often referred to as a peculiar rule of the English law relating to immunity that the assertion just made will no doubt be thought to require strict proof. However, this is easy to provide. It is sufficient to refer to the decision of the Court of Appeal in a case which came before it two years after the *Sultan of Johore's* case, i.e. *The British Wagon Co. Ltd. v. Gray*.¹ In this case the plaintiffs had let some coal wagons to the defendant who was resident in Scotland. The agreement contained the following clause:

'This agreement shall in all respects be construed and carried into effect according to the law of England, and for the purposes thereof the tenant hereby submits to the jurisdiction of the High Court of Justice in England.'

The Court of Appeal, composed of Lord Esher M.R. and of the same Lords Justices who sat in the *Sultan of Johore's* case, i.e. Lopes L.J. and Kay L.J., held that the parties had no power to extend the jurisdiction of the court by way of contractual arrangements. Kay L.J. said:

'Such an agreement could not give the Court power to make an order which the rules say shall not be made. Such a contract was ultra vires, and of no effect.'

Both the Master of the Rolls and Lopes L.J. agreed with him and *The British Wagon Co. Ltd. v. Gray* remained a leading case, quoted annually in both the *White* and the *Red Book* until its authority was in 1920 superseded by the new rule 2A.

At this point it is necessary to interrupt the description of the English development and to cast a fleeting glance at the corresponding position under the laws of the continent of Europe. There it was plainly impossible for any court to hold that parties to a contract did not have it in their power to extend by contract the competence of the court to decide a case not assigned to it otherwise by law. The continental law of civil procedure had been exposed to the influence of Romanist doctrines. One of these was the rule that a *prorogatio fori* was—except in certain cases which are without interest in the present connexion—beyond any doubt fully valid. This had formerly been the rule of Roman law, and the medieval *usus modernus pandectarum* had every reason to retain it.² In all continental countries the problem of local jurisdiction played and plays a very big part: on the territory of every State there were and are a multiplicity of courts, each

¹ [1896] 1 Q.B. 35.

² Wenger, *Institutionen des römischen Zivilprozessrechts* (1925), p. 40 et seq., Engelmann-Millar, *History of Continental Civil Procedure* (Boston, 1927), p. 552.

having jurisdiction *ratione loci* to the exclusion of the other and the limits of each jurisdiction being strictly defined by statute. Such a situation frequently led to results unwelcome to both parties. The need bred its own remedy: the *prorogatio fori*,¹ under which jurisdiction, which would otherwise be lacking, is created by the voluntary submission of the party concerned.² No similar situation existed in this country—at least not after 1875. The continental codes of civil procedure of today all provide for the *prorogatio fori* as a matter of course. If the parties have agreed that, say, the Court of Cologne shall have jurisdiction, this court automatically thereby acquires jurisdiction, even though in the absence of such an agreement the Court of Hamburg would alone have been the Court of competent jurisdiction.

Nothing was more natural than that a rule relating to the internal local venue should similarly apply to the question of international jurisdiction. Indeed, until recently the continental laws happily made little distinction between internal and international competence.³ The rules relating to the former were applied, no matter whether the court agreed upon by the parties was from the point of view of either party or from that of the *lex fori* a 'foreign court'. This indifference to international jurisdiction becomes a little more easily intelligible when it is remembered that throughout long periods of their history countries like Germany, Italy and Switzerland were split up into small States. A pronouncement that the valid conclusion of a binding agreement on a forum convenient to both parties was impossible would have been most detrimental to commerce.

It is therefore not at all surprising that the continental European lawyers dealing with the question of waiver of immunity did not experience the same difficulties as those with which Lopes L.J. and Kay L.J. were confronted. The *prorogatio fori* being a recognized institution of the law of civil procedure, it would have been very strange if they had denied to a foreign sovereign what from of old had been conceded to every foreign subject. Dr. Gmür, a Swiss lawyer, whose compendious research into the question of sovereign immunity is of the greatest value to all later workers in this field, has rightly said that—with a few insignificant exceptions—all continental legal writers have adopted the view that a waiver of immunity

¹ The term itself is not found in the Roman sources, see Wenger, *op. cit.*, p. 40, n. 51.

² Carnelutti, *Sistema del diritto processuale* (1936), vol. i, p. 621, says that the agreement on the competence of the forum is intimately connected with the agreement to compromise pending proceedings that to the extent to which the latter is permitted the former must necessarily be admissible. In France the jurisdiction of the Court of the *domicile élu* is expressly mentioned in Article 59 of the *Code de Procedure Civile*; see also Section 38 of the German *Zivilprozessordnung*. For a most lucid, brief and up-to-date treatment of the continental doctrine on *prorogatio fori* see Schnitzer, *op. cit.*, vol. ii, p. 826 et seq. More details in Baumgärtel, *Wesen und Begriff der Prozesshandlung einer Partei im Zivilprozess* (1957), p. 218 et seq.

³ See, for example, the decision of the former German Supreme Court of 14 November 1929; *Official Reports*, vol. 126, p. 199.

can be agreed in any form, that it does not have to be stated in front of the court and that it is binding on the State which agreed to it.¹ The European continental courts have followed this view, sometimes even without discussion. It was a point on which they felt no doubt. The Swiss Supreme Federal Court held that the issue of government bonds payable in Switzerland constituted an implied submission to the jurisdiction of the Swiss courts.² The decision constitutes an important stepping-stone in the development of the views of the Swiss courts which today have adopted and clarified³ the distinction between *acta gestionis* and *acta imperii* and would not therefore require any longer the assumption of an implied waiver in order to dispense with immunity in a case of this character. The former German Supreme Court held that the formation of the United States Shipping Board and the fact that the Board employed vessels in German waters which were admittedly solely used as merchant vessels did not constitute an implied waiver of immunity.⁴ But the Court left no doubt whatever that any waiver duly agreed, whether before the Court or otherwise, would be treated as fully valid. The French *Cour de Cassation* has adopted a far stricter interpretation of immunity than, for instance, the Belgian and Italian courts,⁵ but since 1888 the French courts have repeatedly held that an implied or express waiver of jurisdiction whether before the courts or elsewhere was admissible.⁶

Among the large number of decisions of national courts on the doctrine of immunity which have been published in the *Annual Digest of International Law* and the *International Law Reports* there are only two cases in which a dissentient view has been voiced. There is one decision of a French provincial court in which doubts were expressed whether a foreign government could waive its rights to be granted immunity.⁷ But the argument played no part in the actual decision of the court and was very clearly nothing but an *obiter dictum*. Far more interesting is an isolated decision of the Supreme Court of Japan⁸ in which it was held that a submission to the jurisdiction of the Japanese courts could not be made by way of an agreement between the foreign State and a private individual. Such a submission could only be made in a State treaty between the Japanese Government and the foreign government.

¹ Gmür (see note 1, p. 261, above), p. 112 et seq.

² *Official Reports*, vol. 44, Part I, p. 54.

³ *Ibid.*, vol. 56, Part I, p. 247, vol. 73, Part III, p. 63.

⁴ *Ibid.*, vol. 103, p. 274.

⁵ As Gmür, *op. cit.*, p. 143 et seq. has shown, the Italian courts followed Mancini and the Belgian courts Laurent in restricting the immunity to *acta imperii*, while in France the development was retarded in consequence of a judgment of the *Cour de Cassation* from the year 1849.

⁶ *Tribunal Civil Seine re Rochaid O. Dahdah v. Tunisian Government*, 10 April 1888; *Journal du droit international* (Clunet), p. 670; and see p. 273, n. 1 below.

⁷ The Court of Appeal of Bordeaux in *Robine v. Consul of Great Britain* (1950), *Int. Law Rep.* 140.

⁸ *Matsuyama and Sano v. Republic of China*, *Annual Digest*, 1927-1928, Case No. 107.

Commenting on this decision, Sir Gerald Fitzmaurice has drawn attention to the fact that the view of the Japanese Court does not follow the same trend of thought as did the Court in *Mighell v. Sultan of Johore*.¹ The Japanese Supreme Court would, it seems, consider a submission in front of a national court to be irrelevant because such a submission does not constitute an agreement complying with the requirements of international law, if one of the parties concluding it was a private individual not represented by its Government. The difficulty has been felt by a number of continental writers. Several attempts have been made to overcome it, though hardly a single one can be said to be fully satisfactory, except perhaps the assumption that in the case of a waiver of immunity customary international law has for long accepted less stringent standards than it does in general.² Whatever the position may be, it can be taken for certain that with the solitary exception of this one decision the judicial consensus in the civil law countries is to the effect that waiver of immunity can be agreed upon in advance between the foreign State and a private individual, that such an agreement can be express or implied and that it has the effect of vesting jurisdiction in the State to whose courts the parties have agreed to submit their dispute.

Reverting to the development of English law, it seems that the problem remained dormant in this country between 1894 and 1924, i.e. for no less than thirty years. This is a significant fact. The English courts had no opportunity of observing the slow transition from the authoritarian State to the welfare State. The next decision quoted as an authority on the problem of waiver in all textbooks is the decision of the House of Lords in *Duff Development Co. v. Kelantan*.³ It is generally said that the alleged rule in *Mighell v. Sultan of Johore* requiring submission *in fronte curiae* was upheld in this case. The decision has been cited in this sense in *Kahan v. Federation of Pakistan*.⁴ A closer investigation will, it is submitted, show that the House of Lords cannot be said to have rested its decision on so broad a basis and that the decision is of relatively small importance in this field.

In that case the Government of Kelantan, which the Foreign Office had certified to be a sovereign and independent Government, had submitted to arbitration. After an award unfavourable to the Government had been made the Government applied unsuccessfully to the Chancery Division for an order that the award might be set aside on the ground of an error in law appearing on the face of it. This application having been dismissed, the Duff Development Company obtained from the King's Bench Division an

¹ Fitzmaurice, 'State Immunity from Proceedings in Foreign Courts', in this *Year Book*, 14 (1933), p. 100 et seq.

² Gmür, *op. cit.*, p. 114 et seq.

³ [1924] A.C. 797; (1923-1924), 40 T.L.R. 566.

⁴ [1951] 2 K.B. 1003; (1951) 2 T.L.R. 697.

order giving leave to enforce the award under section 12 of the Arbitration Act, 1889. In consequence of this an order was made whereby certain monies owing to the Government from the Crown Agents for the Colonies were attached for payment of the taxed costs of the arbitration. On the Government's application, however, this was set aside by Master Jelf on the ground of the sovereign immunity of the State of Kelantan. An appeal against Master Jelf's order was allowed by Roche J. But the Court of Appeal restored the decision of Master Jelf allowing the immunity of the State of Kelantan and the Judgment of the Court of Appeal was upheld by the House of Lords.

It is submitted that the mere recital of these facts shows that the case gave no ground for a decision on the form in which a submission to jurisdiction has to be made in order to be effective. In the first instance, the issue was not whether the English courts had been given power to adjudicate in a dispute between the parties. The only issue was whether an award that had been validly made could be enforced against monies payable from the Crown Agents to the Government. This issue related to the enforcement of an award and not to jurisdiction of the courts. The distinction between submission to the jurisdiction and submission to enforcement is one that is universally recognized as indispensable. It is so recognized not only by all European continental courts but equally by English courts. Thus Brett M.R. in *The Newbottle*¹ said:

'It has always . . . been held that if a sovereign Prince invokes the jurisdiction of the Court as a plaintiff, the Court may make all proper orders against him. . . . It is another question as to what may be the result of an application for execution by seizure of the plaintiff's ship if the judgment should be against the plaintiffs.'

Lord Carson in his dissentient Judgment in the *Kelantan* case commented on these words:

'That is not a decision that the judgment of the Court could not be enforced and rather suggests that there may be questions as to the nature of the particular property which may be taken into execution.'

This comment perhaps does less than justice to the *dictum* of the Master of the Rolls, but in any case the nature of the property in the case, i.e. a debt from the Crown Agents to the Government, was surely one which rendered an execution inappropriate in the absence of a most specific waiver of immunity. Even if there had been a waiver of immunity from jurisdiction the question arose whether there was a waiver of immunity from execution against this particular property.

Secondly, the Government had submitted to arbitration and thereafter applied to the courts to set the award aside. Was this a submission to the

¹ (1885), 10 P.D. 33, at 35.

jurisdiction of the courts? It is true that the submission contained a reference to the Arbitration Act, but it did not follow that the submission extended to the enforcement of awards.

Of the four members of the House who followed the majority view one, i.e. Viscount Finlay, based his judgment exclusively on the view that the waiver which had been declared in the present case did not extend so far as to permit enforcement of an award. He said:

‘The question is a very short one: Have the Kelantan Government waived objection to execution of their property in this country?’

He found that the waiver did not extend to include enforcement. Lord Dunedin in a very brief speech said that an agreement to arbitrate was not a submission to jurisdiction, but merely a contract to allow the jurisdiction to be exercised. The Court had no jurisdiction to enforce such a promise. His speech contains no reference to the *Sultan of Johore*’s case and it is not clear whether he wished to make a distinction between an agreement to refer to arbitration and an agreement to submit to the jurisdiction or between the former and an agreement to permit enforcement.

The only judgment in which a reference to *Mighell v. Sultan of Johore* appears is that of Viscount Cave. No mention was made of the fact that Order 11 rule 2A had in the meanwhile been altered and *Mighell v. Sultan of Johore* was taken to have decided that there is a distinction between an agreement to submit and a submission to jurisdiction and that the latter has to take place actually when the jurisdiction is invoked and not before. Nothing was said about the manner in which the submission has to be made. Viscount Cave, it seems, would have been satisfied by an exchange of letters between the solicitors while the proceedings were in progress and stating that the foreign government submitted to the jurisdiction. Lord Sumner’s is the only speech in which it was said that it was ‘necessary to find something voluntarily done by the foreign sovereign in or towards the Court itself’. But Lord Sumner made no reference to the *Sultan of Johore*’s case and based his judgment upon the decision in *British Wagon Co. v. Gray* which had become a dead letter four years earlier.

It is submitted that the only point that was decided by the House of Lords is the one on which Lord Finlay based his judgment, i.e. that a submission to arbitrate or even a submission to the jurisdiction is not a submission to execution. All arguments which go beyond this must be taken to be mere *obiter dicta*. The decision has in fact been interpreted in this sense in a most interesting decision of the Supreme Court of Hong Kong which is the next case in order of time in which the problem of waiver fell to be considered in a common-law court within the Commonwealth.¹ In this case the China National Relief and Rehabilitation Ad-

¹ *Annual Digest*, 1947, Case No. 29, p. 79.

ministration, a department of the Government of the Republic of China, had obtained from a magistrate's court an order for the delivery of certain quantities of rice which had been stolen. The plaintiffs then issued a writ against the Administration claiming that they were entitled to the property of the rice. The Administration, however, moved for an order that the writ of summons should be set aside on the ground that the Court had no jurisdiction to entertain an action against the Administration, a foreign sovereign. Williams J. held that immunity had been waived in consequence of the proceedings before the Magistrate. This decision raised the question, whether a waiver before a Magistrate could be of any account in regard to proceedings before a civil court in an action, which was obviously quite different in character and purpose from the proceedings before the Magistrate which referred exclusively to immediate possession. The Administration referred to *Duff Development Co. v. Kelantan* but the learned judge held that the case could not 'help in the determination of the present question'. He said:

'The action in this court is not distinct from the proceedings before the magistrate in the way that acceptance of arbitration is distinct from acceptance of the right to execution.'

It is believed that in these words the true meaning of the decision of the House of Lords in the *Kelantan* case is correctly stated and it is regrettable that the decision has not been referred to in later writings on the topic in this country.

A more far-reaching interpretation was, however, put upon the decision in *Duff Development Co. v. Kelantan* by Philip J. in the Supreme Court of Queensland. In *United States of America v. Republic of China*¹ the United States of America applied for the appointment of a receiver for a ship owned by the National Government of China. The latter had hypothecated a ship and in the instrument of hypothecation contracted with the United States that certain action, including an application for the appointment of a receiver, might be taken by the United States. Philip J. held that this was

'at the most an agreement that the Republic of China will consent to the jurisdiction of any Court in the world in respect of the instrument. But this is merely an agreement between these two parties. Before a foreign state can be called upon to elect, there must be *in esse* a proceeding against it, and it is not until a proceeding in the Court has been brought against it that it is put to its election. Despite any contract it may have made with a third person it is under no duty to elect until it has notice of the proceedings against it and its right to refuse to consent is unhampered by any contract it may have made to consent. I think that what was said in *Duff Development Co. v. Kelantan* expresses the law on the point.'

¹ *International Law Reports*, 1950, Case No. 43, p. 168.

This decision, it is respectfully suggested, completely misses the most important point of the case. In this case, which in this regard is a veritable *casus unus*, the National Government of China and the U.S.A. had concluded an agreement waiving the defence of immunity in proceedings before the courts of any third State. The case was quite different from the case before the House of Lords in that in this case two States had been the parties to the agreement, while in the case before the House the agreement had been one between a State and a private party. The rule of immunity is a rule of public international law. Nothing can be more certain than the fact that States are at liberty to conclude treaties which lay down rules of law which they are then bound to observe. Such treaties create law between the parties. The distinction between an agreement under private municipal law to submit to the jurisdiction and an actual submission could not apply here, because the convention between the parties affected the rule of public international law establishing immunity. The decision amounts to a denial of the elementary right of States to regulate their mutual relations by treaty. The reference to *Duff Development Co. v. Kelantan* was entirely out of place. It is, however, interesting to note that the learned judge would apparently have been satisfied with a declaration made at the time of the proceedings though not made *in facie curiae*.

The one English decision which can and must be said to rest on the assumption that only a submission *in facie curiae* will constitute a valid waiver of immunity is therefore the decision of the Court of Appeal in *Kahan v. Federation of Pakistan*.¹ In this case the plaintiff had supplied a number of Sherman tanks to the Government of Pakistan. He did so no doubt partly in reliance on clause 19 of the contract between the parties which reads as follows:

'The interpretation and effect of this agreement shall be construed and governed by English law, and for the purposes of proceedings this agreement shall be deemed to have been made in England and to have been performed here. The Government agrees to submit for the purposes of this agreement to the jurisdiction of the English Courts.'

The clause went on to lay down detailed rules as to service of notices and legal proceedings. Notwithstanding the clear undertaking to accept jurisdiction contained in this clause the Government of Pakistan claimed immunity. Its plea of immunity was upheld by the Court of Appeal, the discussion turning in the main on the *Kelantan* case. Jenkins L.J. would, it seems, not have decided the case in favour of the defendant if he had merely been confronted by the authority of *Mighell v. Sultan of Johore*. He said that the circumstances in issue in that case were 'entirely different' from those in the case under review. But both he and Birkett L.J. felt constrained by the authority of Viscount Cave and Lord Sumner to hold that an actual

¹ [1951] 2 K.B. 1003; (1951) 2 T.L.R. 697.

submission in the face of the court is required for an effective waiver of immunity. Both Lords Justices also referred to Lord Dunedin's judgment, but it is respectfully submitted that this learned Lord had not in fact based his judgment on any such clearly enunciated principle. Contrary to the view of Jenkins L.J. the trail had been blazed by two only, and not by three, of the five learned Lords who had dealt with the matter in the *Kelantan* case. *Kahan v. Federation of Pakistan* is, in fact, the only case in which an English court has had to deal with a clear submission to the jurisdiction and has held this to be ineffective on the ground that it was not made *in facie curiae*.

The decision of the Court of Appeal in *Kahan v. Federation of Pakistan* is the last case in which an English court had to deal with the problem, and that decision may unfortunately tend to discourage parties from again raising the question of the form of waiver in an English court. It is true that in *Sultan of Johore v. Abukabar Tunku Aris Bendahar*¹ the point was raised by counsel before the Privy Council and reference was made to *The Charkieh*,² a decision of Sir Robert Phillimore, in which he had held that the Khedive of Egypt was not entitled to the privilege of a sovereign prince and consequently could not plead immunity. In *The Charkieh* this distinguished international lawyer had also expressed the view that even assuming that the Khedive had been entitled to the status which he claimed, he had by his conduct waived his privilege by using a vessel for ordinary purposes of trading. This opinion, however, had been as clearly an *obiter dictum* as that of Lord Stowell in *The Swift*³ to which Sir Robert Phillimore himself had referred. Be that as it may, the Privy Council in the recent case of the *Sultan of Johore v. Abukabar Tunku Aris Bendahar* had no need to consider the question of implied waiver because there had been a clear submission *in facie curiae*. The only question which the Committee had to decide was whether the Court to which the submission had been made was legally identical with the Court before which the proceedings were now pending. As the Judicial Committee came to the conclusion that such an identity

¹ [1952] A.C. 318; (1952) 1 T.L.R. 1106. Seidl-Hohenveldern, *Commercial Arbitration and State Immunity*, in *International Trade Arbitration* (edited by M. Domke, New York, 1958, American Arbitration Association) says that the best guarantee that a foreign State will not rely on its immunity is that it thereby ruins its credit, thus 'losing more than it can reasonably hope to win by going back on its word'. Experience in the English courts fails to support this view. The Sultan of Johore, after having succeeded once with the plea of immunity, tried it again.

² L.R. 4 Ad. & Ecc. 59 at 99. In *Sultan of Johore v. Abukabar Tunku Aris Bendahar* counsel argued (at p. 330) that Sir Robert Phillimore was speaking as a civilian in *The Charkieh*. It is submitted that this argument is without value. The English courts do not distinguish between a 'civilian' and a 'common law' view of international law (see also p. 272, n. 1 below). It is, however, noticeable that Sir Robert in his Learned Judgment (at p. 100) refers to a continental textbook on public international law written by a contemporary of his. Such references have unfortunately become rare in the English courts which seem to regard nineteenth-century continental writers as distinctly preferable to their own contemporaries.

³ 1 Dods. 320 at 339.

in fact existed, it was not called upon to investigate whether the strict requirements for waiver of immunity stipulated in *Kahan v. Federation of Pakistan* had really become part and parcel of English law.

It may perhaps be thought that the problem of waiver of immunity would lose in importance if the English courts could be persuaded to adopt the course recently recommended by Lord Denning¹ and to follow the precedent set by most European continental courts in restricting immunity to *acta imperii*. The above-mentioned decisions in *The Swift* and *The Charkieh* show that this distinction would not be a complete innovation in English legal thought. However, the question of waiver is independent of the question of defining the extent of immunity. It has retained a great deal of its practical importance even in those legal systems in which the distinction between *acta imperii* and *acta gestionis* has long been recognized. In English law, where this distinction has not yet been recognized by the courts in decided cases, there is even more need for insistence on the principle that foreign powers cannot simply repudiate an undertaking to accept jurisdiction given by them freely, fully and formally. The distinction between *acta gestionis* and *acta imperii* is not and will never be free from difficulties. For the determination of the activities of a State which are to be classed as *iura imperii* involves the primarily political task of distinguishing what are the public functions of the modern State. It would be unduly pessimistic to think that these difficulties will necessarily deter the courts from accepting the distinction; English courts have long practised the art of finely distinguishing in even more complex circumstances. On the other hand, it is obvious that there will always remain a fairly large number of cases in which the practitioner called upon to advise will feel doubtful whether the individual act under consideration falls into one or the other category. In these doubtful cases lawyers who have to draft the agreement not infrequently find it expedient to advise the insertion of a waiver-clause. It will not, however, be open to them to give such advice unless they can feel reasonably assured that the waiver-clause will be regarded as valid and binding by the courts.

In this connexion it may be instructive to consider the case of international borrowing by governments.² An anonymous French writer has recently—no doubt with some justification—said that ‘the foreign state is often the worst kind of bad debtor’.³ Legal advisers of lenders to governments are, of course, perfectly aware of this fact and try to secure their

¹ In *Rahimtoola v. Nizam of Hyderabad*, [1957] W.L.R. (H.L. (E.)) 884 at p. 913 Lord Denning referred with approval to Sir Robert Phillimore’s Judgment in *The Charkieh*, though not to the passage dealing with waiver of immunity.

² Delaume, ‘Jurisdiction of Courts and International Loans’, in *American Journal of Comparative Law*, 6 (1957), p. 189 et seq. is a most instructive article on this topic.

³ Note in *Journal de droit international* (Clunet), 84 (1957), at p. 395.

clients as far as they can. Unfortunately, if the loan is granted under English law, there is at present no possibility at all of securing the lender because of the principle of absolute immunity which protects the borrower. But could those advising the lender really feel very much more confident if the English courts were ready to distinguish between *acta imperii* and *acta gestionis* and to refuse immunity to the latter? Would they not have every reason to fear that English courts might consider any loan raised by a foreign State to be an *actum imperii*? Or if this should seem to be too pessimistic, might it not be possible that English courts—like the Court of Appeal of Paris in a recent decision¹—would at least hold that those foreign State loans constitute *acta imperii* whose proceeds are intended for the use of the public services of the foreign State?

In cases of this type it is submitted that the recognition of a waiver of immunity is not only just and reasonable but indispensable for those negotiating on behalf of the borrowing state. Under English law as it stands at present a foreign government subjecting an international loan agreement to English law and to the consideration of the English courts cannot be compelled by court proceedings to pay. This state of affairs must necessarily lead to lenders shunning English law and avoiding the English courts. A well-advised lender will insist on the application of some foreign legal system, on submission to the jurisdiction of some foreign court and on an express waiver of immunity. International borrowing transactions by governments are thus virtually excluded from the halls of the English courts. Does this self-abnegation of their function by our courts really serve the cause either of justice in England or of England's economic interests?² The answer is obviously in the negative. It is to be hoped that if the point should come before the House of Lords, it will not hesitate to reverse the decision of the Court of Appeal in *Kahan v. Federation of Pakistan* and to give effect to an express and unambiguous contract by a government to waive its immunity.

¹ I Chambre, 29 January 1957, *Journal du droit international*, 84 (1957), p. 393 et seq.

² Even a recent Commonwealth of Australia loan agreement provides that Australia submits to the jurisdiction of the Swiss courts. Siebel in *Zeitschrift für das gesamte Kreditwesen*, 11 (1958), No. 14, supports the proposal that an 'International Loan Tribunal' should be formed. This proposal was first made in 1939; see *Report of the Committee for the Study of International Loan Contracts*, Geneva (1939), p. 6 et seq. It has not led to any positive action during the last twenty years and is hardly likely to be implemented in the foreseeable future.

IRISH EXTRADITION LAW AND PRACTICE¹

By PAUL O'HIGGINS, B.A., LL.B. (*Dublin*)

IMMEDIATELY upon the establishment of the Irish Free State in 1921, the new State was confronted with a number of problems with regard to extradition. Were the extradition treaties entered into by the former United Kingdom of Great Britain and Ireland binding upon the new State? Should the existing procedure for the return of fugitive offenders between Ireland and other parts of the United Kingdom, a procedure virtually identical with that prevailing between county and county in England, be preserved and continued after this radical change in the legal relationship of the two countries? Or should extradition between Great Britain and the Irish Free State be dependent upon the negotiation of an extradition treaty between them? What procedure should apply to the surrender of fugitive criminals

¹ The material on this topic is somewhat sparse. It includes: *Saorstát Éireann: Department of Justice. Administration of Justice: Reciprocity with Great Britain and Northern Ireland. With some notes on the existing arrangements as regards reciprocity in the Administration of Justice between the United Kingdom and the Dominions* (Dublin, 1928). This is the best account, but is out of date. Although it is referred to by Dr. L. Kohn in *The Constitution of the Irish Free State* (London, 1932), at p. 307, it was in fact prepared for intradepartmental purposes and does not seem to have been publicly distributed by the Irish Stationery Office. Andrew Phelan, 'The Republic of Ireland and Extradition', in *Law Journal*, vol. 106, p. 39; Andrew Phelan, 'Extradition and the Fugitive', *Irish Times*, Dublin, 20 October 1955; 'Imaj', 'Over the Border', *Police Review*, 66 (1958), p. 378; P. Carroll, 'Execution in Great Britain of Warrants to Arrest in Criminal Cases issued in Ireland and Vice-versa', *Police Journal*, 25 (1952), pp. 112-16; Anon., 'Northern Ireland Warrants Signed by Clerks', *Justice of the Peace and Local Government Review*, 120 (1957), pp. 67-68.

The subject has been debated on a considerable number of occasions in the parliaments of the Republic of Ireland, Northern Ireland, and the United Kingdom. The most important references are:

- (a) *Parliamentary Debates: Dáil Éireann. Official Report*, vol. 3, cols. 5-6; vol. 48, col. 2058; vol. 95, cols. 1, 177, and 759-62; vol. 96, cols. 2090-1; vol. 118, cols. 1195-7; vol. 144, col. 1285; vol. 153, cols. 1343-50.
- (b) *Northern Ireland Parliamentary Debates: House of Commons: Official Report*, vol. 39, col. 2084; vol. 40, col. 2624. *Northern Ireland: Parliamentary Debates: Senate: Official Report*, vol. 12, cols. 453-4, 499-500, 526.
- (c) *United Kingdom Parliamentary Debates (Hansard) House of Commons Official Report. Fifth Series*, vol. 161, cols. 2097-2103; vol. 176, cols. 567-8; vol. 462, col. 1370; vol. 531, cols. 306-7, 673-4; vol. 542, cols. 727-8; vol. 544, col. 1329; vol. 545, col. 1179; vol. 548, col. 41.

In addition references are to be found in the following: *History of the United Nations War Crimes Commission and the Development of the Laws of War*, compiled by the United Nations War Commission (London, 1948), at p. 429; L. C. Green, 'Recent Practice in the Law of Extradition', *Current Legal Problems*, 6 (1953), pp. 274-96; J. Ll. Edwards, 'Special Powers in Northern Ireland', *Criminal Law Review* (1956), pp. 7-18; A. G. Donaldson, *Some Comparative Aspects of Irish Law* (Durham, N.C., 1957), pp. 119-22; Hamilton Smythe, *The Office of Justice of the Peace in Ireland* (Dublin, 1851), pp. 197-205, 301; J. Gabbett, *A Treatise on the Criminal Law* (Dublin, 1843), vol. ii, pp. 130-5; R. L. Sandes, *Criminal Law and Procedure in the Republic of Ireland* (3rd ed., London, 1951), pp. 84-85; *Halsbury's Laws of England* (2nd ed., London, 1936), vol. xxi, p. 554, para. 976, and (3rd ed., 1954), vol. x, p. 355, para. 649.

between the two Irish States, the Free State with independent Dominion status and Northern Ireland with its own local Parliament but still an integral part of the United Kingdom? Was the procedure of the Fugitive Offenders Act, 1881, to apply between the Free State and the Dominions? Might it not even apply between Great Britain and the Free State? Solutions to these problems have been arrived at over the last thirty years, and the ways in which they have been solved are of considerable interest both to international and constitutional lawyers.

It will be convenient to examine the present Irish law and practice in extradition under four separate heads:

- (A) *Relations between the Republic of Ireland¹ and the United Kingdom (excluding Northern Ireland).*
- (B) *Relations between the Republic of Ireland and Northern Ireland.*
- (C) *Relations between the Republic of Ireland and the Dominions.*
- (D) *Relations between the Republic of Ireland and foreign countries (other than those dealt with already).*

In order, however, to understand the present law and practice, it is necessary first to learn something of the legal régime that prevailed before the establishment of the Irish Free State as an independent Dominion on 6 December 1921.

The Pre-1921 Régime for the Transfer of Prisoners between Ireland and Great Britain

Although there is some authority² for the view that no subject might be sent from one kingdom to another³ except under sentence of the law, it

¹ As a preliminary it may be useful to clarify the position with regard to the name of the Irish State whose capital is at Dublin. Under the 1922 Constitution it was called the Irish Free State (in Irish *Saorstát Éireann*). Under the 1937 Constitution it was declared in Article 4 that 'the name of the State is Éire, or, in the English language, *Ireland*'. By the Republic of Ireland Act, 1948 (No. 22 of 1948), it was declared that the *description* of the State was to be the Republic of Ireland. The Ireland Act, 1949 (12 & 13 Geo. VI, c. 41, s. 1 (3)) would seem to treat the Republic of Ireland as the name of the State. For convenience the term used here will be the Republic of Ireland. See also 'A Matter of Nomenclature', *Irish Jurist*, 16 (1950), pp. 5-6.

² '... At common law there was no power in the state but Parliament that had a right to send any subject out of the realm against his will. It resulted as a natural and necessary corollary from personal liberty, that every British subject had a right to remain in his own country till driven from it by sentence of the law. The great Charter accordingly declared (for it is but a declaration of the common law) that "nullus liber homo capiatur vel imprisonatur aut exuletur nisi per iudicium parium vel legem terrae". And Lord Coke's comment upon Exuletur (2 Inst. 47) is in these words: "This is a beneficial law and is construed benignly; and therefore the King cannot send a subject of England against his will to serve him out of the realm; and not even to Ireland to serve him as deputy"—per Day J. in *R. v. Mr. Justice Johnson* (1805), Howell's *State Trials*, vol. 29, col. 81 at col. 187.

See also the useful survey by W. F. Craies, 'The Compulsion of Subjects to leave the Realm', *Law Quarterly Review*, 6 (1890), pp. 388-409.

³ Ireland was a separate kingdom until the Act of Union, 1800; cf. Maitland, *Constitutional History of England* (Cambridge, 1950): '... but understand that it was the union of two independent kingdoms, not the absorption of a dependent kingdom'.

seems that at least as early as the fifteenth century it was possible for prisoners to be sent from Ireland for trial in England, and vice versa. Early examples of this practice are to be found in the case of Garrett More FitzGerald, who was sent in custody from Ireland to England in 1495,¹ and in the case of O'Rourke in 1581.² From time to time the Irish Parliament proclaimed that no English writ might be executed in Ireland, and attempts to arrest criminals in Ireland on the authority of English writs were foiled. Thus during the Wars of the Roses, when Ireland was in Yorkist hands, a Lancastrian who tried to arrest Richard Duke of York was executed for his pains.³ But in general, although the legal basis for the practice of transmitting persons for trial was by no means clear, it was taken for granted. In *R. v. Connor Lord Macguire* (1645)⁴ an Irish peer, arrested in Dublin for treason committed in Ireland, was sent for trial to London, the English courts having jurisdiction in cases of treason committed abroad under the statute 35 Hen. VIII, c. 2. It is significant that Lord Macguire did not contend that his being sent from one kingdom to the other was in itself unlawful, even although he did challenge the jurisdiction of the English court on other grounds.

The historical background to this system was sketched in *R. v. Mr. Justice Johnson* (1805) by Day J., a judge of the Irish Court of King's Bench:

'... a reciprocal practice of transmittals in capital cases obtained here, if not springing from the prerogative, yet sanctioned by the salutary provisions of the English Habeas Corpus Act,⁵ by the *comitas gentium*, which has established the practice among all civilised states, though utterly unconnected, and by sound and substantial policy; a practice analogous to that of backwarrants between county and county which had long obtained in Ireland before this statute,⁶ and so settled amongst us that it is actually recognised as the law of Ireland by Geo. I., c. 9,⁷ a temporary Irish statute since made permanent.'⁸

Baron Smith in the Irish Court of Exchequer, in the same case, spoke in similar terms:

'The practice of transmitting capital offenders, from Great Britain and Ireland, reciprocally to each other, was a usage, between those distinct and independent countries, less referable to their municipal codes, than to their political connexions, and the *comitas gentium*, or Law of Nations.'⁹

¹ C. G. Walpole, *Short History of Ireland* (2nd ed., London, 1885), p. 79.

² I Anderson 262. For the background to this case see J. W. Willis-Bund, *A Selection of Cases from the State Trials* (Cambridge, 1879), vol. i, pp. 275-8.

³ See W. J. Johnston, 'The First Adventure of the Common Law', *Law Quarterly Review*, 36 (1920), p. 9 at p. 23; also J. T. Gilbert, *History of the Viceroy of Ireland* (Dublin, 1865), p. 370.

⁴ Howell's *State Trials*, vol. 4, cols. 653-754.

⁵ 31 Car. II, c. 2.

⁶ The statute under which the arrest of Mr. Justice Johnson had been made, i.e. 44 Geo. III, c. 92.

⁷ An Act of the Irish Parliament.

⁸ Howell's *State Trials*, vol. 29, col. 81 at col. 188. The system of back-warrants was a system under which a warrant issued in one country for the arrest of a criminal lurking in the other country would be executed in the latter on being endorsed—backed—by a magistrate there.

⁹ Ibid. at p. 330.

These references to the *comitas gentium* as the basis of the practice can scarcely be regarded as anything more than an elegant gloss upon a procedure whose real basis lay, originally, in the needs of the Crown to suppress rebellion in Ireland by whatever means it could, including the removal of criminals from Ireland where it was often impossible to obtain an 'unprejudiced' jury.

Lord Eldon in *Sedley v. Arbouin* (1800) found the basis of the practice, not in the law of nations, but in the position of the King as the Chief Magistrate in the two countries:

'With respect to offences committed here and in Ireland, the law is the same; the charge is made and the offence tried in the county where the offence is committed; and the magistrates act within their own jurisdiction. The King is the great Magistrate of both countries, his power is executed by his Secretary of State; he puts it in force by sending over the party arrested by his warrant to the magistrate of the county where the offence has been committed. . . .'¹

The machinery employed for the transmittal of persons from one country to the other is as obscure as the origin of the practice itself. Thus in *Sedley v. Arbouin* (1800) the machinery was a warrant from the Secretary of State for Ireland addressed to a King's Messenger, who was charged to bear the prisoner to London.² A slightly different machinery is referred to in an Irish Statute of 1721, namely, the handing over of the prisoner under a warrant from the King's representative in Ireland to the master of a ship trading between the two countries and making the latter responsible for the safe delivery of the prisoner to the authorities in England. Section 7 of this Act (8 Geo. I, c. 9) describes the circumstances to remedy which the Act was passed:

'And whereas of late several persons, who have committed murders, robberies, and burglaries in divers parts of the part of Great Britain called England, have come into this kingdom to shelter themselves from justice; and, although they have been apprehended here, could not be sent over into England, by reason several masters of ships trading to England have refused to receive such offenders on board their respective ships, or to give security for their safe keeping and delivery of such offenders to the high sheriff, under-sheriff, justice of the peace, chief magistrate or constable of the

¹ (1800), 3 Esp. 174 at 178; 170 E.R. 578 at 579.

² *Ibid.*, at pp. 175-6: 'By the Rt. Hon. Lord Castlereagh, Chief Secretary to the Lord Lieutenant and Governor General of Ireland.

'These are, in His Majesty's name to authorise and require you, to receive the bodies of John Luther Yates, Davenport Sedley, Micheal Morris, and Sarah Nowlan, now prisoners in the goal at Dublin, and to carry them to London; and upon your arrival there, to carry them before the Lord Chief Justice of His Majesty's Court of King's Bench of England, in order to their being tried for the offence with which they stand charged. In the due execution whereof, all Mayors, Sheriffs, Justices of the Peace, Constables and all others His Majesty's Officers, civil and military, and loving subjects whom it may concern, are to be aiding and assisting to you, as occasion shall require.

'Given at His Majesty's Castle of Dublin, this twelfth day of June 1799.

'To Mr. Wm. Shee and his assistants.'

county, port, harbour or place in England, whither they were bound, though such high sheriff, under-sheriff, justice of the peace, chief magistrate or constable have had proper authority from the chief justice or other justice of his majesty's court of King's Bench in England, to apprehend and receive such offenders; by means whereof several great and notorious offenders have escaped punishment; be it further enacted by the authority aforesaid That where any person now is or hereafter shall be apprehended in any part of this kingdom, against whom any warrant in writing under the hand and seal of the chief justice or other justice of His Majesty's said court of King's Bench, in that part of Great Britain called England, for the apprehending of such person for any robbery, or other capital crime committed in England, shall have issued, it shall and may be lawful to and for the chief governor or governors of this kingdom for the time being by writing under his or their respective hands, to stop and detain any ship, or vessel belonging to any merchant or trader residing or inhabiting in this kingdom lying in the port or harbour of Dublin, and bound for any port or place in England, until the master or person taking charge of such ship shall take such offender or offenders on board his ship or vessel, and shall enter into a bond to His Majesty before the collector of the port of Dublin of the penalty of two hundred pounds, conditioned for the safe custody, conveying and delivery of such offender or offenders (the danger of the seas and of enemies excepted) into the hands of the high sheriff, under-sheriff, justice of the peace, chief magistrate or constable of the county, port, harbour or place, whither such ship or vessel shall be bound or first arrive in England.¹

Section 8 provided that no ship's master should be obliged to accept such offenders unless he was paid 40s. each, and was given the English warrant for the arrest of such offenders.

Transmittal from England to Ireland was only permissible in case of capital offences. In case of transmittal from Ireland to England under 8 Geo. I, c. 9 Ir., there was the same limitation to capital offences, but the limitation did not apply in cases where transmittal was by means of a warrant addressed to a King's Messenger.

Section XI of the Habeas Corpus Amendment Act, 1679, expressly provided:²

'That noe subject of this Realme that now is or hereafter shall be an Inhabitant or Resiant of this Kingdome of England Dominion of Wales or Towne of Berwicke upon Tweede shall or may be sent Prisoner into Scotland Ireland Jersey Gaurney Tangeir or into other Parts Garrisons Islands or places beyond the Seas which are or at any time hereafter shall be within or without the Dominions of His Majestie His Heires or Successors and that every such Imprisonment is hereby enacted and adjudged to be illegall. . . .'

Heavy penalties were provided against those who took any part in such an illegal transportation of any person out of England. Section XV, however, made an exception in the case of 'any person or persons at any time resiant

¹ 8 Geo. I, c. 9 was a temporary statute limited in duration to five years in the first instance. By 9 Geo. II, c. 6, s. I it was continued until 25 March 1757, and to the end of the next session of Parliament thereafter. By 29 Geo. II, c. 8 it was extended for a further twenty-one years. According to Mr. Justice Day it was later made permanent. The statute which eventually made it permanent has not been traced.

² 31 Car. II, c. 2.

in this Realme (who) shall have committed any Capitall Offence in Scotland or Ireland &c.' Such a person might lawfully be sent back for trial in the place where the offence had been committed. This exception was considered in a number of cases.

In *Lundy's* case (1690)¹ the Judges were by Order in Council instructed to meet to consider the applicability of the Habeas Corpus Amendment Act to Colonel Lundy, who as Governor of Londonderry during its siege had endeavoured to betray the city to the Jacobites. He had afterwards fled to Scotland, was there captured, and was then brought to England as a prisoner. The Judges were asked:

'Whether, admitting he were guilty of a capital crime by martial law, committed in Ireland, he might be sent thither from hence to be tried there, in regard to the Act of Habeas Corpus made anno 31 Car. 2, which enacts, that no subject of this realm shall be sent over prisoner to any foreign part: but then it has a proviso, that if any subject of this realm has committed any capital crime in Scotland, or other foreign parts of the King's Dominions, he may be sent from hence to be tried in such foreign place.'

Upon consideration of which proviso the Judges gave a unanimous² opinion, that 'there was nothing in the Habeas Corpus Act (supposing he had committed a capital crime by martial law in Ireland) to hinder Colonel Lundy's being sent to Ireland to be tried'.

Kimberley's case (1730)³ raised the problem whether the exception in the Habeas Corpus Amendment Act applied in the case of an act felonious by Irish law, but not known to English law. The accused was charged with feloniously marrying a young woman contrary to an Irish Act of 6 Anne.⁴ The Court held *per curiam* that *Lundy's* case governed the facts and the accused was sent over to Ireland where he was tried, condemned and executed. Counsel for the prisoner had argued *inter alia* that they did not know of any process by which the prisoner could be sent from England to Ireland for trial there.⁵ The matter was referred to the Attorney-General for consideration, who decided that the prisoner might be taken there by a King's Messenger, 'who should have a warrant to carry him to Ireland'.⁶

It should be noted that until 1782 Ireland had no Habeas Corpus Act of its own. However, Mr. Eden, the Irish Secretary, said, in 1781, when the heads of a Habeas Corpus Bill were introduced in the Irish Parliament, 'that from the usage of Ireland, which was the common law of the realm, and from the conduct of the Judges, the Habeas Corpus Act was in

¹ 2 Vent. 314; 86 E.R. 460.

² Three of the Judges were in fact not present (Gregory, Eyre and Turton).

³ There are two reports: 2 Stra. 848 (93 E.R. 890) and FitzGib. III (94 E.R. 677). They differ as to detail.

⁴ 2 Stra. 848. According to the other report, FitzGib. III, Kimberley did not himself marry the young woman, but aided and abetted another young man to marry her.

⁵ FitzGib. III.

⁶ 2 Stra. 848.

operation in Ireland, though not under the authority of Statute'.¹ The Irish Habeas Corpus Act,² when passed, contained no provision analogous to Section XI of the English Act. 'The whole of the important provision for preventing illegal imprisonment beyond the seas was most unaccountably omitted', commented Mr. Justice Day; 'I say unaccountably; because if a confidence in the House of Brunswick were (as suggested from the bar) the cause of this omission, the generous love of freedom which has characterised that house would have furnished an equal argument against any abridging any provision of that other Magna Charta.'³ It would seem, however, that, despite the omission, the Irish Habeas Corpus Act was applied as though it did in fact contain provisions similar to Section XV of the English Habeas Corpus Act together with the exception in favour of 'foreign parts of the King's dominions' contained in the English Amending Act.⁴ So, up to the Union of the two kingdoms in 1801, it was possible to send persons accused of capital crimes from one kingdom to a place in the other where the crime had been committed. As Day J. said:

'Such then was the state of the law in the present point at the time of the Union. The interests of the two islands becoming altogether identified by that measure, and it being material to create a co-operation between them in the administration of criminal justice, the common legislature conceived that it resulted from and was conformable to their reciprocal obligations and common interest, to provide that neither should continue an asylum for the *fugitives* of the other.'⁵

In 1804 an Act, 44 George III, c. 92, was passed 'to render more easy the apprehending and bringing to Trial, Offenders escaping from one Part of the United Kingdom to the other, and also from One County to another'. Section 3 provided for felons 'and other malefactors' accused of crimes in Great Britain who had fled to Ireland. Section 4 provided for the reverse case. The words 'other malefactors' extended the class of crimes for which persons could be sent from one country to the other. Where warrants had been issued in one part of the United Kingdom against persons who escaped to another, it was declared lawful 'for any Justice of the Peace whither such person should escape, go or reside, to indorse his name on such warrant for execution in that place'.⁶

The first case under 44 Geo. III, c. 92 was the trial of Mr. Justice Johnson, fourth justice of His Majesty's Court of Common Pleas in Ireland.⁷ He was arrested in Dublin under a warrant signed by Lord

¹ *The Parliamentary Register or the History of the Proceedings and Debates of the House of Commons of Ireland*, vol. i, p. 31.

² 21 & 22 Geo. III, c. ii (Ir.).

³ Howell's *State Trials*, vol. 29, col. 81 at col. 188.

⁴ See the judgments of the several courts, *ibid.*, cols. 81-502, especially Smith B. in Irish Court of Exchequer: '... But let the cause of the omission have been what it may, can we doubt that the spirit of the omitted clause should be considered as pervading the Irish Statute?'

⁵ *Op. cit.*, col. 189.

⁶ Hamilton Smythe, *op. cit.*, pp. 197-205.

⁷ Howell's *State Trials*, vol. 29, cols. 81-502.

Ellenborough, Chief Justice of the Court of King's Bench in England, indorsed by J. Bell, a magistrate of the County of Dublin, acting under the authority conferred on him by this Act. Mr. Justice Johnson was indicted in the English King's Bench of certain misdemeanours, namely, the publishing of scandalous and malicious libels of and concerning His Majesty's Government of Ireland, in that he was alleged to be the author of certain anonymous letters from Ireland published in *Cobbett's Political Register*, which were critical of the actions of certain of the leading members of the British Administration in Ireland, particularly their actions in handling the unsuccessful rising led by Robert Emmett in 1803. It was alleged by Mr. Justice Johnson that the Act had been passed specifically for the purpose of securing his prosecution in England, the offences of which he was accused being at the time of their commission outside the scope of the exception provided by section XV of the English Habeas Corpus Amendment Act.¹

In the *habeas corpus* proceedings challenging the legality of his arrest, Mr. Justice Johnson was represented by the leading members of the Irish Bar.² It was argued that the offence had been committed as much in Ireland as in England, in that copies of the *Political Register* were offered for sale in Dublin; that to interpret 44 Geo. III, c. 92 as warranting the transmission of an offender for one of the inferior order of crimes, committed in Ireland, to be arrested by a magistrate in England, and sent to Ireland for trial, was to decide that by a side wind, and not by express words, the English Habeas Corpus Act of Car. 2 was *ipso facto* repealed;³ that trial in England would mean the incurring of extra expense and inconvenience as compared to a trial in Ireland; that the witnesses whom Mr. Justice Johnson would call were all resident in Ireland and there was no means by which he could compulsorily secure their attendance at his trial in England; that he was an Irish resident, who at no relevant time had left

¹ For the background to the case, giving some support to Mr. Justice Johnson's allegation of personal spite in securing the passage of the Act, see F. Plowden, *History of Ireland from its Union with Great Britain &c.* (Dublin, 1811), vol. ii, pp. 58-74. Cobbett himself had already been prosecuted for his publication of the libels, and found guilty, although he was never in fact called up for sentence. He appeared as a witness at the trial of Mr. Justice Johnson. *R. v. Cobbett* (1804), Howell's *State Trials*, vol. 29, cols. 1-54.

² One cannot help feeling that a reference to some at least of the arguments of counsel in this case might have been of assistance to counsel in *The State (Duggan) v. Tapley*, [1952] I.R. 62. A very full version of Curran's speech in the Court of Exchequer, Dublin, can be seen in *The Speeches of the Rt. Hon. John Philpot Curran . . . on the late very interesting State Trials* (4th ed., London, 1815), pp. 411-76.

³ Counsel were forced to argue in this way because of the absence of an equivalent to Section XV of the English Habeas Corpus Act, 1679, in the Irish Act of 1782. If the Court were to hold that the Act 44 Geo. III, c. 92, authorized the transmission of a person accused of a misdemeanour in England being sent thither from Ireland, then the same words so authorizing his transmission thither, which were identical with those providing for the transmission of felons and other malefactors from England to Ireland, would have to be interpreted in the same way, and thus repeal the express provisions of the English Habeas Corpus Act by a side wind.

Ireland, and that the Act was prospective, not retrospective, and could not therefore apply to offences committed prior to its enactments, and so on.¹

By a majority the Judges of the Irish Courts of King's Bench and Exchequer held that the arrest was lawful and Mr. Justice Johnson was sent for trial to London. After lengthy proceedings there and after a verdict of guilty had been returned, the Crown entered a *nolle prosequi* and Mr. Justice Johnson was discharged. He subsequently resigned from the Bench.²

While the litigation was still in progress a further Act was passed, 45 Geo. III, c. 92, to solve some of the problems which had emerged in the course of the proceedings before the Irish courts. Sections 1 and 2 provided for the granting of bail. Section 3 provided machinery to secure the compulsory attendance of witnesses from one part of the United Kingdom to give evidence in any criminal prosecution in another part. The remaining provisions solved other procedural problems.³

In 1814 the Act, 54 Geo. III, c. 186, extended to Ireland a previous English statute providing for the backing of warrants between England and Scotland.⁴ Smythe's comment was that it was difficult to see for what purpose the Act had been extended to Ireland, as all its provisions seemed to have been already enacted by 44 Geo. III, c. 92, ss. 3 and 4.⁵

The machinery established in 44 Geo. III, c. 92 was replaced by new machinery in fresh Acts passed in 1848, 1849 and 1851. First, the Indictable Offences Act, 1848,⁶ provided for the backing of English warrants in Ireland, in the case of the offender escaping to Ireland, and vice versa. The effect was to institute between England and Ireland the same close and non-critical reciprocity as regards the apprehension and return of offenders as was subsequently provided for between contiguous parts of the British Dominions by Part 2 of the Fugitive Offenders Act, 1881.⁷ The relations created by the 1848 Act were in fact closer because no discretion was given (as there was in the case of the Dominions) to refuse the return of the offender in certain cases. Similar provision was also made for Scottish warrants.⁸ Then the Summary Jurisdiction Act of the same year⁹ extended

¹ There was also some difficulty with regard to bail on which the Act was silent. The Irish Judges were of opinion that bail might be allowed in such cases.

² See also Constantine J. Smyth, *Chronicle of the Law Officers of Ireland* (London, 1839), pp. 133-4. For a consideration of other legal problems involved in this case see F. Plowden, *op. cit.*, vol. ii, pp. 379-89.

³ See Hamilton Smyth, *op. cit.*, p. 196. In *Ex parte Gibbons* (1829), 2 H & B 425, it was decided that unless the words 'not bailable' were written on the warrant (a Scots warrant) the Act made it imperative to grant bail.

⁴ 13 Geo. III, c. 31.

⁶ 11 & 12 Vict., c. 42.

⁸ Note also the Indictable Offences Act (Amendment) Act, 1868 (31 & 32 Vict., c. 107), which extended the operation of the 1848 Act to the backing of warrants between Ireland and the Channel Islands.

⁵ *Op. cit.*, p. 198.

⁷ 44 & 45 Vict., c. 69.

⁹ 11 & 12 Vict., c. 43.

to cases triable summarily the procedure as to the backing and execution of warrants in cases triable on indictment. The joint effect of these two Acts was therefore that a fugitive offender was handed over, without question, as between the several parts of the United Kingdom, whether the alleged offence was indictable or not. In 1849 there was passed an Irish Act¹ relating to indictable offences only, Sections 13 and 14 of which authorized the backing and execution of warrants in indictable cases as between Ireland and other parts of the United Kingdom.²

Two years later there was passed the Petty Sessions (Ireland) Act, 1851,³ Section 27 of which dealt with the case where a warrant had been issued by a justice of the peace in Ireland but the offender was found in some other part of the United Kingdom. It provided that in this case the warrant was to be backed by the Inspector-General of the Royal Irish Constabulary or his Deputy and it could then be executed in that other part of the United Kingdom.⁴ Section 29 provided for the converse case, where the offence was committed in some part of the United Kingdom outside Ireland, in which case it was provided that the warrant should be presented to the Inspector-General of the Royal Irish Constabulary, who should endorse it for execution in Ireland. The Act also laid down that these provisions were to apply equally to any warrants for the arrest of any person charged with any indictable crime or offence for which he was punishable by law. There was no provision for any judicial examination in that part of the United Kingdom in which the fugitive was found. The fugitive was to be surrendered merely on proof of the authenticity of the warrant.

The position, therefore, on the eve of the establishment of the Irish Free State was that between Ireland and the other parts of the United Kingdom there was in operation a procedure for the return of fugitive offenders from Ireland for trial in that part of the United Kingdom where the offence had been committed. The reason for this procedure was that the jurisdiction of magistrates in the different districts was essentially local; warrants for arrest were not valid for execution outside the jurisdiction of the magistrate issuing the warrant. To solve this problem provision had been made by the English statutes 23 Geo. II, c. 26 and 24 Geo. II, c. 55, whereby warrants issued in one county could be made valid for execution in another county by the simple process of a magistrate in the county, where the person to be arrested was found, indorsing the original warrant with his signature. The Act 44 Geo. III, c. 92, extended this procedure to the backing of English warrants in Ireland and vice versa. This was replaced by the

¹ Indictable Offences (Ireland) Act, 1849 (12 & 13 Vict., c. 69).

² This Act was repealed by Section 43 Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict., c. 93).

³ 14 & 15 Vict., c. 93.

⁴ 30 & 31 Vict., c. 19, gave power to Assistant Inspectors-General of the Royal Irish Constabulary to back warrants in the absence of the Inspector-General and Deputy Inspector-General.

Indictable Offences Act, 1848, and Petty Sessions (Ireland) Act, 1851, which, with appropriate modifications, applied the procedure for the backing of warrants between English counties to Ireland and other parts of the United Kingdom.

Before considering the position after the establishment of the Irish Free State it may be helpful also to summarize the statutory authority for the execution of Irish warrants in different parts of the United Kingdom and vice versa:

(a) *Between England and Ireland* the provisions for the backing and execution of warrants were:

- (i) Indictable Offences Act, 1848,¹ sections 12-14.
- (ii) Petty Sessions (Ireland) Act, 1851,² sections 27-30.
- (iii) Summary Jurisdiction Act, 1848,³ section 3.

(b) *Between Ireland and Scotland* the provisions were:

- (i) Indictable Offences Act, 1848,¹ section 15.
- (ii) Summary Jurisdiction Act, 1848,³ section 3.
- (iii) Petty Sessions (Ireland) Act, 1851,² sections 27-30.

(c) *Between Ireland and the Isle of Man* the provisions were:

- (i) Petty Sessions (Ireland) Act, 1851,² sections 27-30.
- (ii) Petty Sessions Act, 1864,⁴ section 15.

(d) *Between Ireland and the Channel Islands* the provisions were:

- (i) Petty Sessions (Ireland) Act, 1851,² sections 27-30.
- (ii) Indictable Offences Act (Amendment) Act, 1868,⁵ sections 4-5.

The essential difference between the procedure under the Petty Sessions (Ireland) Act from that employed under the Indictable Offences Act, 1848, was that under the former an Irish warrant, before it could be executed in another country, had to be endorsed by the Inspector-General or Deputy Inspector-General of the Royal Irish Constabulary. These officers also had authority to endorse a foreign warrant for execution in Ireland, unless it was endorsed by a magistrate having jurisdiction in the areas in which it was to be executed. Under the Indictable Offences Act endorsement need only be by a competent magistrate.

(A) *Post-1921 Relations between the Republic of Ireland and the United Kingdom (excluding Northern Ireland)*

The new Dominion of *Saorstát Éireann* found itself in a somewhat curious position in regard to its reciprocal relations with England in the

¹ 11 & 12 Vict., c. 42.

² 14 & 15 Vict., c. 93.

³ 11 & 12 Vict., c. 43.

⁴ *The Statutes of the Isle of Man (1860-1871)*, Douglas, 1888.

⁵ 31 & 32 Vict., c. 107.

administration of justice. On the one hand, there were in existence numerous statutes setting up a very close system of reciprocity between England and Ireland. On the other hand, the Irish Free State was a self-governing Dominion and from that point of view its relations with England and with other Dominions should, strictly speaking, be regulated by the Fugitive Offenders Act of 1881.¹ The immediate problem was, to what extent were the reciprocal arrangements between England and Ireland still effective and in force as between England and the Irish Free State? The relevant texts for the solution of this problem were:

(a) Article 73 of the Irish Free State Constitution:²

'Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (*Saorstát Éireann*) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactments of the Oireachtas.'³

(b) Section 3 of the Adaptation of Enactments Act, 1922:⁴

'For the purpose of the construction of any British Statute the name "Ireland" whether used in conjunction with the expression "Great Britain" or by implication as being included in the expression "United Kingdom" shall mean *Saorstát Éireann*.'

(c) A British Order in Council, the Irish Free State (Consequential Adaptation of Enactments) Order, 1923,⁵ by paragraph 8 of which it was provided:

'(1) The provisions of any enactments which are applicable to:

- (a) the endorsement and execution in England, Scotland, the Channel Islands, or the Isle of Man, of Warrants issued by Justices' Courts or judges of courts in Ireland;
- (b) the service in England or Scotland of writs of subpoenae of the superior courts in Ireland and the punishment in England or Scotland of persons disobeying the same;

shall apply respectively to:

- (i) warrants issued by justices, courts or judges of the courts in the Irish Free State;
- (ii) writs of subpoena of superior courts in the Irish Free State;

and such warrants, writs of subpoena . . . shall in Northern Ireland have the like effect and shall be dealt with in like manner and with the like consequences as if they had originated in England.'

The general effect of the British Order in Council was to provide for the maintenance of the system of reciprocal backing and execution of warrants

¹ 44 & 45 Vict., c. 69.

² Constitution of the Irish Free State (*Saorstát Éireann*) Act, 1922 (No. 1 of 1922); Irish Free State Constitution Act, 1922 (13 Geo. V, sess. 2, c. 1).

³ For a discussion of the effect of Article 73 see L. Kohn, *The Constitution of the Irish Free State* (London, 1932), pp. 364-70.

⁴ No. 2 of 1922.

⁵ S.R. & O. 1923, No. 405.

between the Irish Free State and Great Britain, and also of Irish Free State warrants in Northern Ireland, although not of Northern Ireland warrants in the Irish Free State.¹ One difficulty that theoretically arose in the continued application of the statutes referred to under paragraph 8 of the Order was that in some cases, e.g. under Petty Sessions (Ireland) Act, 1851, those enactments presupposed the existence of specified officers of the Royal Irish Constabulary, who no longer existed in 1923, having in fact been disbanded before the Order was made. The Free State *Gárda Síochána* Act, 1923, provided for the establishment of a new police force but, on a strict interpretation of this Act, no provision was made for the vesting of the powers of the superior officers of the Royal Irish Constabulary in any officer of the new police force.² Even if there had been, British courts might adopt the view that no legislature other than the British Parliament had power to equate the new Irish police force to the former Royal Irish Constabulary so as to entitle English courts and police to give recognition to the acts of the new Irish Police Force. To this the reply can be made that, since the Royal Irish Constabulary no longer existed at the date of the Order, either paragraph 8 was *ab initio* doomed to be nugatory in its application to warrants, or that the *Gárda Síochána* or any new Police Force in Ireland was intended to be recognized without any further authority than the Order itself as the successor to the Royal Irish Constabulary for the purposes of the Order. There is no discussion of this problem in such reported English cases as have been found on the backing of warrants between the two countries.³ A Home Office Circular of 25 April 1923 states that warrants for the arrest of offenders who have committed crimes in England and have fled to the Irish Free State should be sent to the Chief Commissioner of the Dublin Metropolitan Police or to the Commissioner of the Civic Guards (*Gárda Síochána*) which suggests that the British Home Office at any rate considered the Commissioner of the *Gárda Síochána* as having succeeded to the legal powers of the Inspector-General of the Royal Irish Constabulary regarding the backing of warrants.⁴ Furthermore, in 1938 an Order was made in Dublin, section 3 of which provided:⁵

‘Sections 29 and 31 of the Petty Sessions (Ireland) Act, 1851, shall be construed and

¹ See Part (B) for a separate discussion of the problem in relation to the Irish Free State and Northern Ireland.

² *Gárda Síochána* (Civic Guards) Act, 1923 (No. 37 of 1923).

³ A similar problem arises in the case of an Irish warrant signed by a Peace Commissioner (who by section 88 of the Irish Courts of Justice Act (No. 10 of 1924) is given the jurisdiction vested in a J.P. prior to 6 December 1922 in respect of signing warrants) sent for execution to England.

⁴ By the Police Forces Amalgamation Act, 1925 (No. 7 of 1925), the *Gárda Síochána* and Dublin Metropolitan Police were amalgamated into one police force.

⁵ Statutory Rules & Orders 1938, No. 300 (Petty Sessions (Ireland) Act, 1851, Adaptation Order, 1938).

have effect as if the reference therein contained to the Inspector-General of Constabulary and the Deputy Inspectors-General of Constabulary were references respectively to the Commissioner of the *Gárda Síochana* and the Deputy Commissioners of the *Gárda Síochana*.¹

In fact, there seems never to have been any doubt expressed in the Irish Free State as to the fact that the system of backing of warrants which existed prior to 1921 survived the metamorphosis of southern Ireland from a unit of the United Kingdom into an independent Dominion. Mr. Kevin O'Higgins, Minister for Home Affairs, stated in *Dáil Éireann* on 12 April 1923:¹

'The provisions of the Petty Sessions (Ireland) Act, 1851, and the Indictable Offences Act, 1848, which relate to the execution of Irish warrants in Great Britain, and *vice versa*, and which are not inconsistent with the terms of the Constitution, remain in force in virtue of Article 73 of the Constitution.'

Similarly, the question whether the existence of this system was compatible with the independent status of the Free State seems never to have been fully discussed. This may be because of the restraint exercised by the British authorities in sending warrants to Dublin for execution in the Irish Free State at a time when such actions might well have been resented there and have given rise to the Free State Government being forced by public opinion to suspend the execution of backed warrants there. The Home Office Circular of 25 April 1923 expressly urged such restraint, when it said: 'In view . . . of the present position of the country it will not be advisable to set this machinery in motion except in a case of real public importance.'²

One of the most urgent problems arising out of the troubles between the two countries, which had led to the separation of the Irish Free State from Great Britain, was that of the deportees. These were persons, usually of Irish ancestry or birth, suspected by the British authorities of having taken part in revolutionary activities not in Ireland but in Britain. Acting under regulations made under the Restoration of Order in Ireland Act 1920³ the Secretary of State ordered the internment in the Irish Free State of a number of these persons, who were arrested and deported to Dublin, where they were imprisoned by the Irish authorities. The arrest and deportation of British subjects, some of whom had never been in Ireland in their lives aroused some indignation.⁴ In the course of numerous exchanges in

¹ *Parliamentary Debates: Dáil Éireann. Official Report*, vol. 3, col. 6.

² *Justice of the Peace Journal*, 87, p. 350.

³ 10 & 11 Geo. V, c. 31. These regulations were in effect a continuation of section 14 of the Defence of the Realm (Consolidation) Regulations, 1914. Under these latter several unsuccessful attempts were made to deport Irishmen from Ireland—see pp. 12–18, *Defence of the Realm Act in Ireland*, published by the Committee of Public Safety, Dublin, 1915. But see also Brady's case, 91 L.J. (K.B.) 98.

⁴ Cf. *Parliamentary Debates. Official Report. 5th Series. House of Lords*, vol. 53, cols. 829–47. In *R. v. Secretary of State for Home Affairs, Ex parte O'Brien*, [1923] 2 K.B. 361; upheld on

Parliament Mr. Ramsay MacDonald asked what would happen if the Irish Free State authorities made representations to the Secretary of State that among the deportees there were persons guilty of indictable crimes; would the trials of such persons take place in Ireland? The Attorney-General (Sir Douglas Hogg) replied:

'The arrangement with the Irish Free State Government is that no proceedings shall be instituted against any of these persons anywhere without the consent of my Rt. Hon. friend the Home Secretary. My Rt. Hon. friend will have to be satisfied that there is a *prima facie* case before giving his consent, and he has arranged to consult with me in any matter of legal difficulty or doubt. When the consent is given, the person to be tried will be placed in exactly the same position, and dealt with in exactly the same way as if he had not been deported. If the crime is one committed in England and triable there, application will be made to an English magistrate for a summons or warrant, and the case will be tried before an English magistrate and sent for trial by him, if a *prima facie* case is made out. If the crime is one committed in Ireland and triable there a warrant will be applied for before an Irish magistrate. It will be backed by an English magistrate under the provisions of section 12 of the Indictable Offences Act of 1848, and the accused will be tried before the Irish magistrate, and by him committed for trial if a *prima facie* case is made out. . . .'¹

Thus it was from the mutual desire of the British and Irish governments of the time to deal with Irish extremists and at the same time to protect the essential rights of those interned and deported that there sprang an agreement between the two governments to keep in force the system of backing warrants which had existed before 1921. But for the fact that immediately upon the establishment of the Irish Free State, the Irish Government entered into an agreement to maintain in force the system of backing of warrants apparently as a concession to British public opinion, the continuation of this system of reciprocal surrender of criminals might well have been approached in a more critical spirit from the Irish side.²

The first reported case in which the validity of the system of backing of warrants between the Irish Free State and Great Britain was tested before the Irish courts was in 1936 in the case of *The State (Dowling) v. Kingston*.³ In this case a man was arrested in the Irish Free State on a Scottish warrant for failing to maintain his wife and family who had gone

appeal, [1923] A.C. 603, the Court of Appeal held that regulation 14B was inconsistent with the Irish Free State Constitution Act, 1922 (at p. 383). Scrutton L.J. in particular referred to section 11 of the Habeas Corpus Act of 1679 in support of his conclusion. Thereafter deportations ceased. Cf. also *White v. Warnock* (1947), 81 I.L.T.R. 35 (a House of Lords decision involving deportation from Northern Ireland).

¹ 19 March 1923, *House of Commons Debates*, vol. 161, cols. 2097-8.

² About a hundred persons were illegally deported from England in 1923 to the Irish Free State. In consequence of the decision in *O'Brien's* case, an Act of Indemnity was passed (13 & 14 Geo. V, c. 12) preventing the institution of legal proceedings by those deported, and also making provision for compensation to them. See further Porter R. Chandler's excellent article: 'Praemunire and the Habeas Corpus Act, Considered in Connection with the Irish Deportations and the Case of *Ex parte O'Brien*', *Columbia Law Review*, 24 (1924), pp. 272-84.

³ (1937), 71 I.L.T.R. 223; (1939), 73 I.L.T.R. 195; [1937] I.R. 483 and 699.

to live in Scotland. Both the High Court and Supreme Court upheld the validity of the arrest on the grounds that Article 73 of the Constitution had preserved the force of statutory provisions providing for the backing of warrants. In the High Court Gavan Duffy J. dissented on the grounds that to uphold the validity of the man's arrest was in effect to enforce two sets of criminal law in Ireland, that the offence came very near to being a civil one, and that the alleged offender had not in any event committed the offence within the jurisdiction of the Scottish courts. In 1936 a new Constitution was enacted, Article 50 of which was in similar terms to Article 73 of the former Constitution. Included in this Constitution, however, was a provision absent from its predecessor, namely Article 29 (3) which provided that:

'Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.'

This provision formed the basis of an attempt to challenge the validity of the system of executing backed warrants in Ireland on the grounds that such a system was inconsistent with the 'generally recognised principles of international law'.¹ The High Court and Supreme Court had little difficulty in holding that there is no generally recognized principle of international law which forbids the surrender in accordance with the Petty Sessions (Ireland) Act, 1851, s. 29, to Great Britain of persons to answer a charge of a criminal offence.

In England the validity of the system was upheld in *R. v. Commissioner of Metropolitan Police, Ex parte Nalder*.² Nor does the passing of the Republic of Ireland Act, 1948,³ and the departure of Eire from the Commonwealth seem to have made any difference.⁴ The auxiliary machinery established by 45 Geo. III, c. 92, s. 3, whereby witnesses can be subpoenaed to attend to give evidence in any criminal prosecution in any part of the former United Kingdom of Great Britain and Ireland also appears to have continued in force after the establishment of the Irish Free State in virtue of the continuation of laws Articles in the 1922 and 1937 constitutions.⁵

¹ *The State (Duggan) v. Tapley* (1951), 85 I.L.T.R. 22; (1952), 86 I.L.T.R. 87; [1952] I.R. 62.

² [1948] 1 K.B. 251; [1947] 2 All E.R. 611. The system has been acted on in other cases, such as: *St. George Campbell Laing* (1927), *Police Journal*, 25 (1952), pp. 115-16; *Davidson's case*, *The Times*, London, 10 June 1952, p. 3; *The State (Rossi and Blythe) v. Bell*, [1957] I.R. 281; (1956), 91 I.L.T.L.R. 143; *R. v. Metropolitan Police Commissioner, Ex parte Melia*, [1957] 3 All E.R. 440. ³ No. 22 of 1948.

⁴ See Ireland Act, 1949 (12 & 13 Geo. VI, c. 31). Sections 12-14 Indictable Offences Act, 1848, have been preserved and modified by section 103 and Schedule V of the Magistrates' Courts Act, 1952 (15 & 16 Geo. VI, and 1 Eliz. II, c. 55). See also *Home Office Circular*, No. 210/1951.

⁵ Article 73 of the 1922 Constitution and Article 50 of the 1937 Constitution. See also Hamilton Smythe, op. cit., pp. 35-37; P. A. O Siochain, *Outline of Evidence, &c., in Ireland* (Dublin, 1953), p. 76. There is, however, no reported case on the continued application of this Act, and it is still possible that if the application of the Act today were challenged it might be held to be no longer in force in the Republic of Ireland.

It thus seems clear that the close reciprocal links in the administration of criminal justice between Great Britain and Ireland have to a large extent survived the constitutional changes that have taken place since 1920.

On the emergence of a new Dominion there arose the possibility of an additional system for the surrender of fugitive criminals between Great Britain and Ireland, namely, the system applied under the Fugitive Offenders Act, 1881, to the 'foreign dominions' of the Crown.¹ Did this Act apply between Great Britain and the Irish Free State? Mr. Kevin O'Higgins, Minister for Home Affairs, speaking in *Dáil Éireann* in 1923, was of opinion that the British Fugitive Offenders Act, 1881, in the absence of an express enactment by the *Oireachtas*, did not apply to the Irish Free State.² On the British side, the Irish Free State (Consequential Adaptation of Enactments) Order, 1923, provided in paragraph 8 (2):

'For the purposes of the Fugitive Offenders Acts, 1881 and 1915, in their application to any part of His Majesty's dominions outside the British Islands, the Irish Free State and the British Islands exclusive of the Irish Free State shall be treated as if they were separate parts of H.M. dominions.'³

The Order in Council merely called attention to the fact that the Irish Free State and what is now the United Kingdom of Great Britain and Northern Ireland were henceforth to be regarded as separate territories in applying the Fugitive Offenders Acts. It did not refer to the possible application of the Fugitive Offenders Acts between the Irish Free State and the United Kingdom and there seems never to have been any effort to invoke the Fugitive Offenders Acts as between the two States. The only judicial dictum on the subject is that of Lord Goddard in *R. v. Metropolitan Police Commissioner, Ex parte Nalder*,⁴ when in reply to counsel's argument that proceedings should have been brought under the Fugitive Offenders Act, 1881, and not under the Petty Sessions (Ireland) Act, 1851, he said:

'It is not necessary to express any opinion whether that Act [i.e. Fugitive Offenders Act, 1881] can apply at all between England and Eire, though the strong inclination of my opinion is that it cannot. Whether it does or does not, it is clear that these other Acts apply, and that what has been done here has been done regularly and in accordance with them.'

The probability therefore is that the Fugitive Offenders procedure never did apply between the Irish Free State and Great Britain. However that may be, it almost certainly cannot now be applied in view of the fact that the Republic is no longer one of 'Her Majesty's dominions'.

At this point it may be useful to indicate the principal differences in the

¹ 44 & 45 Vict., c. 69.

² *Parliamentary Debates: Dáil Éireann Official Report*, vol. 3, col. 6.

³ S.R. & O. 1923, No. 405.

⁴ [1948] 1 K.B. 251 at p. 256.

procedure under the Fugitive Offenders Acts and under the system of backing of warrants at present in application between Ireland and Great Britain. Under Part I of the Fugitive Offenders Act a warrant issued in one part of the Commonwealth may be endorsed for execution in another. A person arrested on such a warrant is to be brought before a magistrate who, if a *prima facie* case is established against the prisoner, may commit him to prison to await his transfer. The fugitive may not, however, be surrendered until after the expiration of fifteen days and he must be informed of his right to apply for habeas corpus. A person who is not tried within six months or who is acquitted in the country to which he is returned for trial, can apply to be sent back free of cost to the place in which he was apprehended. The Act is limited to offences punishable by imprisonment with hard labour for twelve months or more. Further, where the application for the return of the fugitive is frivolous or not made in good faith, or the circumstances are unjust or oppressive, &c., a superior court may make such order, including the denial of the surrender of the fugitive, as it may think just. Part 2 applied only to groups of British possessions to which by reason of their contiguity or otherwise, it is deemed expedient to Her Majesty to apply the same by Order in Council. The main differences between the procedure employed under the two Parts of the Act, are that in case of the procedure under Part 2 it is not necessary to establish a *prima facie* case against the prisoner before he is surrendered, and secondly, Part 2 is not limited to offences of a more serious nature.

The safeguards contained in that Act are entirely absent from the present procedure under the Indictable Offences Act and Petty Sessions (Ireland) Act, 1851. If these safeguards are considered necessary between members of the Commonwealth, it is hard to see why they should be less necessary between two States, not bound together by any common polity.

(B) *Relations between the Republic of Ireland and Northern Ireland*

The pre-1921 system in existence between the whole of Ireland and Great Britain is now in force between Northern Ireland and Great Britain.¹ This is the result of the continuation of laws clause of the Government of Ireland Act, 1920, s. 61.² The powers of the Inspector-General, &c., of the Royal Irish Constabulary have by 12 & 13 Geo. V, c. 8 (N.I.), s. 7 (1)(f) been given to certain officers of the Royal Ulster Constabulary established by that Act.

As between the Six Counties of Northern Ireland and the Republic the position immediately after the establishment of the Irish Free State was

¹ There have been some modifications in the procedure; see *Justice of the Peace and Local Government Review* 120 (1957), pp. 67-68, 122.

² 11 & 12 Geo. V, c. 67.

that in 1923 a British Order in Council expressly provided that warrants issued in the Irish Free State were to have the like effect as regards backing for execution in Northern Ireland as if they had originated in England.¹ Some months later the Free State issued the Customs and Excise (Adaptation of Enactments) Order 1924,² section 9 of which provided:

‘Every provision contained in any British Statute and relating to

(a) the endorsement and execution in Ireland of warrants issued by Justices, Courts or Judges of Courts in England, Scotland, the Channel Islands, or the Isle of Man; and

(b) the service in Ireland of writs of subpoena of Superior Courts in England or Scotland, and to the punishment in Ireland of persons disobeying the same:

shall apply respectively to:

(i) the endorsement and execution in Saorstát Éireann of warrants issued by Justices, Courts or Judges of Courts in England, Scotland, Northern Ireland, the Channel Islands, and the Isle of Man; and

(ii) the service in Saorstát Éireann of Writs of Subpoenas of Superior Courts in England, Scotland and Northern Ireland and to the punishment in Saorstát Éireann of persons disobeying the same;

And every such warrant and Writ of Subpoena shall in Saorstát Éireann, have the like effect and shall be dealt with in the like manner as if it had originated in Saorstát Éireann.’

As a result of these two enactments Northern Ireland warrants were to be executed in the Irish Free State, and Irish Free State warrants were to be executed in Northern Ireland. But although this is the law, in practice things have worked out somewhat differently. In *O’Boyle and Rodgers v. Attorney-General and General O’Duffy* in 1929³ it was held by the High Court in Dublin that there was no authority for the practice of executing Six-County warrants in the Free State. The Customs & Excise (Adaptation of Enactments) Order was not referred to by the Court or by Counsel in argument, and the decision must be regarded as having been reached *per incuriam*.⁴ Admittedly, it is possible that the Irish High Court or Supreme Court might hold the Order to be *ultra vires* or unconstitutional, but unless and until this happens, the legal position must clearly be that laid down in the Order. The reason why the Order was not referred to may be that since the Order, except for section 9, dealt with Customs and Excise matters, the

¹ S.R. & O. 1923, No. 405, paragraph 8 (1); Irish Free State (Consequential Adaptation of Enactments) Order, 1923.

² E.C.O., No. 1 of 1924, *Iris Oifigiúil* (Dublin Gazette), 21 March 1924.

³ [1929] I.R. 558; (1929), 43 I.L.T.R. 33.

⁴ Similarly erroneous are Gavan Duffy P.’s *obiter* remarks in *The State (Duggan) v. Tapley*, [1952] I.R. 62 at 65: ‘... One curious result of the constitutional changes (since 1920) is that no authority now has jurisdiction to indorse for execution here a warrant issued by a magistrate in the Six Counties, no adaptation of the law having been made for that purpose: *O’Boyle & Rodgers v. A.-G. & O’Duffy*, [1929] I.R. 558.’

relevant section was overlooked.¹ Be that as it may, the result of the decision was that the Irish Free State authorities ceased to execute Northern Ireland warrants. In return, the Northern Ireland authorities, disregarding the express provisions of the above-mentioned British Order in Council,² refused to execute Free State warrants. This action was explained by Viscount Charlemont in the Northern Ireland Senate:

'The Free State authorities now hold the view that warrants issued in Northern Ireland are no longer executable in the Free State.

'Notwithstanding the gravity of the situation which has thus arisen, and in spite of the urgent representations which have been made by the Government of Northern Ireland, no tangible steps have as yet been taken by the Free State Government to legalise the continuance of the former reciprocal arrangement for the execution of warrants.

'Having regard to these facts, and to the grave doubts which exist as to the validity of executing warrants issued by the courts of the Free State, the Government of Northern Ireland has been advised that any further execution of such warrants by the Northern Ireland authorities would not be justified.'³

Thus both governments seem to be acting contrary to their own laws in declining to execute one another's warrants,⁴ and in suitable circumstances it might be possible by means of *mandamus* to secure a reversal of the situation. Section 4 (4) of the Government of Ireland Act, 1920,⁵ expressly excludes from the legislative competence of the Northern Ireland Parliament:

'Treaties, or any relations with foreign states, or relations with other parts of H.M. dominions, or matters involving the contravention of treaties or agreements with foreign states or any part of H.M. dominions; or offences connected with such treaties

¹ It should be noted that the Customs and Excise (Adaptation of Enactments) Order, 1924, has not been revoked and is therefore still in force—letter from Attorney-General of the Republic of Ireland, dated 13 August 1958.

² S.R. & O. 1923, No. 405.

³ 14 October 1930; *Parliamentary Debates: Official Report. The Senate*, vol. 12, col. 453.

⁴ There has been one case since 1929 in which a Free State warrant was executed in Northern Ireland, i.e. *White v. Warnock* (1947) 81 I.L.T.R. 35. White was arrested in Northern Ireland on a warrant signed by a District Justice in Éire and endorsed by the Inspector General of the Royal Ulster Constabulary. After he had been handed over he was tried on a charge of murder and condemned to death (on appeal a verdict of manslaughter was substituted—*A.-G. v. White*, [1947] I.R. 247). While steps were being taken to put him on trial in Dublin for the murder of a policeman while resisting arrest, an application was made to the King's Bench Division in Northern Ireland for a writ of habeas corpus addressed to the Minister for Home Affairs in Northern Ireland. This was refused on the ground that the applicant was not in his custody or control. An appeal to the Northern Ireland Court of Appeal was dismissed on the ground that it was not a criminal matter. A petition to appeal was presented to the House of Lords and an application made to expedite the hearing. It was held unanimously that the writ could not be issued since the person to whom it was addressed had not the custody or control of White. It may be noted that White claimed that if a request were made by the Northern Ireland Minister for Home Affairs to the Éire authorities for the return to his custody of White so as to enable the Minister to comply with due process of law and to produce White before or to the order of their Lordships such request would be complied with. Cf. *R. v. Secretary of State for Home Affairs, Ex parte O'Brien*, [1923] A.C. 603.

⁵ 11 & 12 Geo. V c. 67.

or relations or procedure connected with the extradition of criminals under treaty or the return of fugitive offenders from or to any part of H.M. Dominions. . . .'

In the case of the Foyle fisheries, however, the Northern Ireland (Foyle Fisheries) Act, 1952, confers on the Northern Ireland Parliament a measure of competence in regard to this aspect of its relations with the Irish Free State:

'Notwithstanding any restriction on the powers of the Parliament of Northern Ireland, that Parliament may legislate with respect to fisheries in the Foyle Area (of which part is in Northern Ireland and part in the Republic of Ireland), and may in particular

'(d) authorise the apprehension and delivery to a member of the police forces of the Republic of Ireland of a person found offending in the Foyle area against any law of the Republic of Ireland corresponding to a law of the Parliament of Northern Ireland passed by virtue of this Act, or corresponding to any other law relating to fisheries which has effect in Northern Ireland, where there is reason to believe that that person is resident in the Republic of Ireland.'¹

In virtue of this enactment the Northern Ireland Parliament passed the Foyle Fisheries Act, 1952,² which provides for the handing over of suspected offenders in the circumstances provided above to the police of the Republic. There is a corresponding statute in the Republic.³

In the belief that, apart from the Foyle Fisheries Acts, there is no statutory procedure authorized for the surrender of fugitive criminals, there has grown up a working arrangement between the police forces of the two parts of Ireland whereby suspected criminals are taken into custody and 'politely conducted to a convenient place on the Border and handed over to the corresponding authority'.⁴ As to this working arrangement, Mr. W. O'B. FitzGerald S.C. speaking at the Inaugural Meeting of the King's Inns Law Students Debating Society on 2 December 1955, is reported to have said:

'That was efficacious, no doubt, but it was legally disreputable, and the practice had been restrained by a Judge of the High Court in the Republic.⁵ It was undesirable that such a state of affairs should continue. People could be unlawfully detained by the police and possibly handed over to the other jurisdiction before an injunction could be obtained. . . .'⁶

And Mr. Phelan has said:

'At present a thief, for example, who flees across the border is apprehended and

¹ 15 & 16 Geo. VI and 1 Eliz. II, c. 11.

² *Ibid.*, c. 5.

³ *Irish Times*, Dublin, 3 December 1955.

³ No. 5 of 1952.

⁵ Mr. FitzGerald informs me that the case he refers to here is *O'Boyle & Rodgers v. The Attorney-General & General O'Duffy*, [1929] I.R. 558; (1929), 43 I.L.T.R. 33.

⁶ *Irish Times*, Dublin, 3 December 1955. Mr. FitzGerald is a Bencher of the Hon. Society of the King's Inns, Dublin.

returned only by the police co-operating in unlawful acts and his inability to make an *habeas corpus* application in time.¹

It is understandable, therefore, that there has been some considerable feeling, particularly in Northern Ireland, for the conclusion of the extradition treaty between the Republic of Ireland and the United Kingdom which would include Northern Ireland within the operation of its provisions. The governments of the three States concerned have all expressed themselves in favour of such an arrangement.²

(C) *Relations between the Republic of Ireland and the Dominions*

Despite Mr. O'Higgins's opinion to the contrary, quoted above, it has been held by the Irish High Court in *The State (Kennedy) v. Little*³ that the Fugitive Offenders Act, 1881, was in force between the Irish Free State and other Dominions, by virtue of Article 73 of the Constitution.⁴ This position was continued in force by Article 50 of the 1936 Constitution. The problem now is whether in the light of the Republic of Ireland Act, 1948, and the departure from the Commonwealth of the Republic of Ireland, the Act is still in force between the Irish Republic and the Dominions.

From the point of view of the Irish courts, the Irish Republic would probably be outside the scope of the Act, as Ireland is no longer one of Her Majesty's dominions. They would probably adopt an attitude similar to that of the Indian Supreme Court in *Madras v. C. G. Menon* in 1954.⁵ However, it is by no means certain that all the Dominions would adopt the same attitude. It will be remembered that the Irish Free State (Adaptation of Enactments) Order, 1923, provided for the Irish Free State and the British Islands exclusive of the Irish Free State to be treated as separate parts of H.M. dominions for the purpose of the application of the Fugitive Offenders Acts, 1881 to 1915, in their application to any part of H.M. dominions outside the British Islands.⁶ Clearly, it must have been the intention that the Fugitive Offenders Acts should apply as between the

¹ *Law Journal*, vol. 106, p. 39.

² For the United Kingdom point of view see *House of Commons Debates*, vol. 545, col. 1179; vol. 544, col. 1329; and vol. 531, cols. 673-4.

For the Northern Ireland point of view see *Northern Ireland House of Commons Debates*, vol. 39, col. 2084.

For the Republic of Ireland point of view see the exhaustive statement by J. A. Costello, Esq., S.C., as Prime Minister on 30 November 1955; *Dáil Éireann Debates*, vol. 153, cols. 1333-50.

³ [1931] I.R. 39. For a Canadian comment on this case see 'Ireland and Extradition', *Fortnightly Law Journal*, 1 (1931), p. 42.

⁴ The Court attached importance to the safeguards for individual liberty in the Act: '... The Act encircles the person charged with a complete network of safeguards to ensure that no injustice shall be done', at p. 48.

⁵ A.I.R. (1954), S.C. 517; *International Law Reports* (1954), 46.

⁶ S.R. & O. 1923, No. 405, para. 8 (2).

Irish Free State and the overseas territories of the Crown and some at least of the Dominions might so apply the Acts.

(D) *Relations between the Republic of Ireland and Foreign Countries*¹

Since 1922 neither the Irish Free State nor the Republic of Ireland has entered into any extradition agreement with any foreign State. The problem here therefore resolves itself into two questions:

(i) Are the extradition treaties made by the former United Kingdom of Great Britain and Ireland with foreign States now binding on the Republic of Ireland?

(ii) Are the British Extradition Acts, 1870–1906, which provide the legal machinery for extradition under these treaties, now in force in the Republic of Ireland?

As to the first question, the Republic of Ireland is bound by any applicable rule of international law governing the succession of a new State to the rights and obligations of the predecessor in the sovereignty of the territory. Is there, however, any applicable rule of international law on this point? Mr. Green has recently expressed the opinion:

‘It would appear that although there are inconsistencies in recent judicial practice in the field of continuity there is a tendency for extradition agreements to continue to operate despite changes in state personality.’²

Mr. Phelan expresses the same view more firmly:

‘Under the Extradition Acts 1870 to 1906 the Republic of Ireland is under treaty obligations with foreign states.’³

Mr. Phelan’s *dictum*, however, skips a number of stages in the argument. It assumes that the Extradition Acts are in force in the Republic of Ireland; that it is by virtue of these municipal statutes and not by any principle of international law that the Republic is bound by the obligations of treaties concluded by the former United Kingdom of Great Britain and Ireland, &c. In fact, the international legal position seems not to be that assumed by Mr. Phelan. Oppenheim says:

‘... it is controversial whether treaties of ... extradition, and the like, made by the extinct State remain valid, so that succession takes place. The majority of writers—correctly, it is believed—answer the question in the negative, because such treaties, although they are non-political in a sense, possess some prominent political features.’⁴

¹ The only important case on extradition with a foreign State decided by Irish courts before 1922 is *R. v. Tandy* (1800), Howell’s *State Trials*, vol. 27, col. 1191. For the background of this case and an account of the amercement of the City of Hamburg for wrongfully surrendering Tandy (a French citizen) in the sum of four million marks, see F. Plowden, *op. cit.*, vol. i, pp. 126–43. ² L. C. Green, *op. cit.*, p. 295. ³ A. Phelan, *Law Journal*, vol. 106, p. 39.

⁴ *International Law* (8th ed. by Sir Hersch Lauterpacht), vol. 1, p. 159. See also R. W. G. Murlalt, *The Problem of State Succession with regard to Treaties* (The Hague, 1954), p. 16; D. P. O’Connell, *The Law of State Succession* (London, 1956), pp. 35–36, 38.

Some recent decisions of municipal courts, on the other hand, would seem to support Mr. Green's argument that while there is no principle of international law which obliges new states to comply with the terms of extradition treaties entered into by their predecessors, there is a tendency towards continuity of such agreements.¹ Perhaps, one argument in favour of the belief that treaties entered into by the United Kingdom of Great Britain and Ireland, during the period 1801–1921, are now binding on the Republic of Ireland, is that before the Union the constitutional position was that the King, as King of Ireland, was competent to make treaties binding on Ireland and that this position was in no way altered in 1801 by the Act of Union.²

The first statement on the matter by the Irish Government was on 12 April 1923 when the Minister for Home Affairs, Mr. Kevin O'Higgins, said that since the Extradition Acts, 1870–1906, did not apply to the Irish Free State, the question whether there were any treaties in force did not arise.³ The assumption underlying this statement, that if there is no municipal legislation enabling a State to comply with treaty obligations then that treaty is not in force, is clearly wrong and conflicts with a fundamental principle of international law.⁴ In 1933, Mr. de Valera as Minister for External Affairs made a general statement in *Dáil Éireann* on the Irish Free State's attitude towards United Kingdom treaties formerly applicable in regard to the Free State:

'... The present position of the Irish Free State with regard to treaties and conventions concluded between the late United Kingdom and other states is based upon the general international practice in the matter when a new State is established. When a new State comes into existence which formerly formed part of an older State its acceptance or otherwise of the treaty obligations of the older State is a matter for the new State to determine by express declaration or by conduct (in the case of each individual treaty) as considerations of policy may require. The practice here has been to accept the position created by the commercial and administrative treaties and conventions of the late United Kingdom until such times as the individual treaties and conventions themselves are terminated or amended. Occasion has then been taken, where desirable, to conclude separate engagements with the States concerned.'⁵

¹ *Ex parte O'Dell & Griffen* (1953), 3 D.L.R. 207; [1953] O.R. 190; *International Law Reports* (1953), pp. 40–41 (High Court of Ontario: Ashburton Treaty 1842 binding on Canada); *Ivanovic v. Artukovic*, *Ware v. Artukovic* (1954), *International Law Reports*, pp. 66–75 (U.S. Court of Appeal, 9th Circuit: 1902 Treaty between U.S.A. and Serbia in force between U.S.A. and Yugoslavia). But cf. *Re Westerling* (1951), *Malayan Law Journal*, vol. 17, p. 38; *Malayan Law Reports*, 1 (1950), p. 228 (Republic of Indonesia not named in Order in Council bringing Anglo-Dutch extradition Treaty, 1898, into operation, therefore Republic was not successor to Dutch treaty rights).

² See R. B. McDowell, *Irish Public Opinion 1750–1800* (London, 1944), pp. 78–80.

³ *Parliamentary Debates: Dáil Éireann. Official Report*, vol. 3, col. 5.

⁴ See G. Schwarzenberger, *International Law* (3rd ed., London, 1957), vol. i, p. 69, and the authorities cited there.

⁵ *Parliamentary Debates: Dáil Éireann. Official Report*, vol. 48, cols. 2058–9.

Speaking in *Dáil Éireann*, as Taoiseach and Minister for External Affairs on 7 March 1946, with particular reference to extradition treaties, he said:

'Pending the enactment of appropriate legislation by the Oireachtas no extradition treaties or arrangements have been concluded with other states. No attempt has been made, therefore, at any time to make operative any such treaties or arrangements in regard to the description of persons referred to by the Deputy.' (Refugees from political ill-treatment and persecution.)¹

What exactly is the strict legal position is therefore far from clear. Whether there is any applicable rule of international law is doubtful. There seems only to be a tendency in favour of continuing extradition treaties. Again, it is uncertain whether Mr. de Valera intended to include extradition treaties amongst the 'administrative treaties' of the United Kingdom the position created by which the Free State was prepared to accept. The theoretical position being obscure, it is necessary to seek guidance in what has actually happened in practice.

When the Irish Free State separated from the United Kingdom of Great Britain and Ireland, there were forty-three extradition treaties in force between the United Kingdom and other states.² Since 1921 only two of these treaties have been invoked between the Irish Free State and foreign states, namely, the Treaty with Belgium of 29 October 1901 and the Treaty with the United States of America, of 12 July 1889.

In August 1944 Baron d'Huyse was assassinated in Belgium, by the German S.S. and members of the Security Corps 'De Vlag'. Of the eight persons responsible, two escaped. They were believed to have taken refuge in Ireland, and in December 1949 their extradition was requested by the Belgian Government. In October 1952 the Irish Government replied that one of the two persons concerned could not be found. As to the other, it refused his extradition on the ground that his case fell within the scope of Article 7 of the 1901 Extradition Treaty between Belgium and the United Kingdom, which provided that no person should be surrendered if the offence in respect of which his surrender was demanded was deemed by the State of refuge to be a political offence or to be an act connected with such an offence. At no stage in these proceedings did the Irish authorities contend that the 1901 Treaty was not in force between Belgium and the Republic; on the contrary, they invoked an Article of the Treaty to justify their refusal to surrender the person concerned. With regard to this extradition Treaty, therefore, the position is that Belgium by invoking it has shown that she considers it still to be in force. Accordingly, if the Irish Republic were to invoke the Treaty against Belgium, the latter would presumably be precluded under the principle of estoppel from claiming that it

¹ *Parliamentary Debates: Dáil Éireann. Official Report*, vol. 99, cols. 2090-1.

² For the list of such Treaties see the Appendix.

was not in force between the parties.¹ Similarly, Ireland, having invoked a term of the Treaty in its favour, might equally be precluded from denying the validity of the Treaty at a future date.

In 1931 the Irish Free State instituted extradition proceedings in the United States for the surrender of an alleged embezzler under the terms of the 1889 Treaty between the United States of America and the United Kingdom. The United States magistrate having been satisfied as to the sufficiency of the evidence, the individual was surrendered to the Irish authorities.² Thus both the Republic and the United States of America have treated this Treaty as being in force between them.

Once it is admitted that these two treaties are in force *vis-à-vis* the Republic of Ireland, the latter would clearly be acting somewhat inconsistently if she were at any future date to deny that the other extradition treaties of the former United Kingdom were binding upon her.³

Inquiries addressed to the diplomatic representatives of the other States who had extradition treaties with the United Kingdom in force in 1922 have evoked somewhat various replies on the question of their applicability to the Irish Republic.⁴ Three States, Chile, Haiti and Peru, have no opinion on the matter.⁵ Five States, Cuba, Denmark, the Netherlands, Guatemala and Italy, would seem to believe that the treaties are inapplicable *vis-à-vis* the Irish Republic.⁶ Three States, Ecuador, Luxembourg and Hungary seem to take the view that the treaties are in force *vis-à-vis* the Republic.⁷ One State, Sweden, has expressly denounced the treaty with regard to the Republic of Ireland.⁸ Two States, Austria and Switzerland, seem to be favourable to the treaties being in force, but make this dependent upon a declaration by the Irish Republic that she is willing to be bound by these treaties.⁹ It would seem that there is little doubt that nearly all these States

¹ *Eastern Greenland case, P.C.I.J., Series A/B, No. 53*. See also B. Cheng, *General Principles of International Law as Applied by International Courts and Tribunals* (London, 1953), pp. 141-9; I. C. MacGibbon, 'Customary International Law and Acquiescence', in this *Year Book*, 33 (1957), pp. 115-45; I. C. MacGibbon, 'Estoppel in International Law', *International and Comparative Law Quarterly*, 7 (1958), pp. 468-513.

² I am indebted for this information to a letter, dated 18 April 1958, from Malcolm Anderson, Assistant Attorney-General, Criminal Division, United States Department of Justice.

³ The mere fact that a treaty uses such terms as 'British Consul', 'London Police Magistrate', 'the Law Officers of the Crown', 'His Britannic Majesty's Principal Secretary of State for Foreign Affairs', &c., does not preclude it from being enforced between the Irish Republic and a foreign State. What is done in practice is to substitute for the British officials, government departments, &c., the corresponding Irish official, government department, &c. No Irish court is likely to refuse an application for extradition on the mere ground that the treaty refers to British and not Irish officials, &c. The Adaptation of Enactments Act, 1922 (No. 2 of 1922), provides that all references in British legislation to ministers, official departments, or the authority of the Government of the late United Kingdom are in future to refer to the corresponding ministers, &c., in the Irish Free State.

⁴ See Appendix.

⁵ *Ibid.*, (E), (N) and (AA).

⁶ *Ibid.*, (G), (H), (V), (M) and (Q).

⁷ *Ibid.*, (I), (S) and (O).

⁸ *Ibid.*, (II).

⁹ *Ibid.*, (B) and (JJ).

would be willing to negotiate with the Republic with a view to bringing the treaties into force between them. In the other twenty-seven cases there is no evidence available as to the attitude of the States concerned.

It seems also that, even were the former extradition treaties reinvigorated, the Irish Republic would be unlikely to be willing to extradite Irish nationals.

A further problem, if perhaps a somewhat academic one, arises with regard to treaties entered into by the United Kingdom after the establishment of the Irish Free State as a Dominion. A number of such treaties provide for the accession to them by any member of the British Commonwealth of Nations which desires to do so. The procedure laid down is that the Government concerned gives notice of its desire to accede to the Government of the country concerned through His Britannic Majesty's diplomatic representative to that country. Treaties containing such provisions were made with Austria,¹ Denmark,² Hungary,³ Iceland,⁴ and Switzerland.⁵ In regard to a second group of treaties there is a similar provision, but in this case the Irish Free State is expressly named as one of the Dominions which may accede to the treaties by giving notice in the same way as above. These treaties are between the United Kingdom and Albania,⁶ Czechoslovakia,⁷ Finland,⁸ Iraq,⁹ Poland,¹⁰ and the United States of America.¹¹ Has the Irish Republic any right to accede to these treaties?

In practice there is very little doubt that, if the Irish Republic expressed a wish to accede, the States concerned would unhesitatingly accept its adherence. This is because from the very nature of extradition treaties, which facilitate international co-operation in the suppression of crime, States are desirous of extending the scope of this co-operation. It was because of the many gaps in the prevailing system of bilateral extradition treaties in Europe that there was so much initial support for the idea of a draft multilateral extradition treaty drafted by the Council of Europe. Whether the Irish Republic has an actual right to accede to such treaties is, however, more doubtful.

In the case of the *Free Zones of Upper Savoy and the District of Gex* the

¹ Convention of 29 October 1934, Article 3; see *The Statutory Rules & Orders and Statutory Instruments, revised to December 31, 1948: (Excerpt from Volume IX): Fugitive Criminal* (H.M.S.O., London, 1951) (hereinafter referred to as *Fugitive Criminal*), p. 28.

² Supplementary Convention of 15 October 1935, Article 3; see *Fugitive Criminal*, p. 103.

³ Treaty of 18 September 1936, Article 3; *ibid.*, p. 176.

⁴ Supplementary Convention of 25 October 1938, Article 3; *ibid.*, p. 184.

⁵ Convention of 19 December 1934, Article 3; *ibid.*, p. 407.

⁶ Treaty of 22 July 1926, Article 17; *ibid.*, p. 7.

⁷ Treaty of 11 November 1924, Article 17; *ibid.*, p. 90.

⁸ Treaty of 30 May 1924, Article 17; *ibid.*, p. 130.

⁹ Treaty of 2 May 1932, Article 18; *ibid.*, p. 196.

¹⁰ Treaty of 11 January 1932, Article 19; *ibid.*, p. 308.

¹¹ Treaty of 22 December 1931, Article 14; *ibid.*, p. 425.

Permanent Court of International Justice made its well-known pronouncement on the creation of rights by treaty in favour of third States:

‘It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is, however, nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such.’¹

This pronouncement would certainly seem to support the view that the Dominion of the Irish Free State could claim to be entitled to accede to the extradition treaties in question. The position of the Irish Republic, however, is much more doubtful, since the treaties merely provide for the accession of other ‘Members of the Commonwealth’. The Republic of Ireland not being a member of the Commonwealth,² it is possible to argue that even if prior to 1948 it had such a right, the original parties to the treaties regarded membership of the Commonwealth as a condition precedent to such accession. Where, however, the Irish Free State is referred to specifically as having a right to accede, even where it is also referred to as a dominion, it is less certain that membership of the Commonwealth was regarded as a precondition.

Having discussed the problem of the extradition treaties themselves, a secondary question arises. To what extent are the Extradition Acts, 1870–1915, now in force in the Republic of Ireland?³ These Acts provide the machinery in municipal law whereby the treaties can be implemented. If they are not in force because of repugnancy to the Constitution or absence of adaptation the Republic is obliged by international law to introduce legislation to enable the enforcement in Ireland of the provisions of such extradition treaties as are in force between the Republic of Ireland and foreign States.⁴ Although there is authority for the view that these Acts are not now in force,⁵ it would seem that the Adaptation of Enactments Act, 1922, is wide enough to include the adaptation to Irish conditions of these Acts.⁶ Johnston J. has laid down principles upon which the Adaptation Act and the continuation of laws Article in the Irish Constitution are to be interpreted:

‘. . . it is reasonably plain from the Adaptation Act that a Statute of the United

¹ *P.C.I.J.*, Series A/B 46, p. 147.

² The combined effect of the Republic of Ireland Act, 1948 (No. 48 of 1948), and the Ireland Act, 1949 (12 & 13 Geo. VI, c. 41).

³ For a statement of the position prior to 1921, see J. O’Connor, *The Irish Justice of the Peace* (Dublin, 1911), pp. 301–2.

⁴ *Exchange of Greek and Turkish Populations* (1925), *P.C.I.J.*, Ser. B., No. 10, p. 20.

⁵ *Parliamentary Debates: Dáil Éireann. Official Report*, vol. 3, col. 5.

⁶ No. 2 of 1922.

Kingdom, which was in force in Ireland in 1922, is not to be rejected merely because of some difficulty of terminology, of procedure, or of change of circumstance. There must be something in the Act which renders it unworkable in principle by reason of its inconsistency with the Constitution before it can be regarded as not coming within the scope of the Article.' (Continuation of Laws Article.)¹

There is nothing in the Extradition Acts inconsistent with the Irish Constitution, and Mr. Phelan is of the opinion that the Acts are in force.²

Towards the end of the last war governments of neutral states, including Ireland, were approached by the Allied Powers with a request that they should give assurances that they would not harbour 'war criminals' and would surrender them for trial to the Allied Powers. On various dates questions were asked in *Dáil Éireann* as to the attitude adopted by the Irish Government to this request. The Minister for External Affairs (and Taoiseach), Mr. de Valera, postponed answering twice, and hedged on the third occasion.³ The Irish Government's reply was made public through a spokesman of the British Government speaking in the House of Commons on 14 November 1948, who declared that the Irish Government had stated that they could not give assurances which would preclude them from exercising the right to give asylum 'should justice, charity, or the honour or interest of the nation so require'. At the same time, since the war began it had been their 'uniform practice to deny admission to all aliens whose presence would be at variance with the policy of neutrality or detrimental to the interests of the Irish people or inconsistent with the desire of the Irish people to avoid injury to the interests of friendly states, and that when such aliens landed they were deported to their countries of origin as soon as possible'. The British spokesman commented that in the view of the British Government, it would be 'detrimental to the interests of the Irish people' if war criminals were to be harboured there.⁴

In fact it seems that only on one occasion has a request been made for the surrender by the authorities in Dublin of a person or persons alleged to be war criminals, namely, the Belgian application referred to above.

Conclusions

The present position of the extradition law and practice of the Republic of Ireland is far from satisfactory, largely because of the obscurity and un-

¹ *The State (Kennedy) v. Little*, [1931] I.R. 39 at p. 45. He was concerned to decide whether the Fugitive Offenders Act, 1881, was still in force.

² *Law Journal*, vol. 106, p. 39; he gives no reasons.

³ *Dáil Éireann: Parliamentary Debates*, vol. 95, col. 1 (3 October 1944); col. 177 (18 October 1944); cols. 759-62 (9 November 1944).

⁴ *Parliamentary Debates: (Official Report): 5th Ser., House of Lords*, vol. 134, cols. 927-43. See also *History of the U.N. War Crimes Commission*, p. 429; *The Times*, London, 15 November 1944. Spain, Portugal, Sweden and Switzerland gave replies which were slightly more conciliatory.

certainty in which this topic is shrouded. This is in part, at least, due to the fact that the approach of Irish governments and even Irish courts, has been very largely based on expediency and not upon principle. Gavan Duffy J. in *The State (Dowling) v. Kingston* referring to the continued enforcement of the Petty Sessions (Ireland) Act, 1851, procedure argued:

‘... The juristic entity which was the basis of (the Petty Sessions (Ireland) Act) has disappeared and the legal status of the Irish citizen to-day differs from that of his ancestors in 1851. What then is left to support the (Act) ... ? The answer is convenience; but convenience is a sorry substitute for law. ...’¹

Mr. Costello, speaking as Taoiseach, in *Dáil Éireann* on 30 November 1955 said:

‘... I would not go so far as to say that the existing arrangement in this respect is an ideal one and it has in fact been the subject of some criticism both in the Dáil and the British House of Commons. But it has at least the practical merit that it works.’²

The attitude of the Northern Ireland Government in declining to execute Republic of Ireland warrants is in disregard of the applicable law, although it may be expedient from a political point of view. The accident that a statutory instrument was overlooked in the decision by the Irish Free State High Court that there was no authority for the execution in the Free State of Northern Ireland warrants is surely deplorable.³ While there has been a lot of friction between the two Irish States as a result of the refusal of either of them to enforce the other’s warrants, the position would be no better if in fact such warrants were executed. This is because in practice it would almost certainly involve the surrender to the other State of political offenders. Public opinion would be outraged and the mutual backing of warrants would once again be ended. Far better would it be for the Irish Republic to conclude an extradition treaty with the United Kingdom which would cover Northern Ireland.

The present understanding between the police forces of the two Irish States under which they hand over offenders to one another without any lawful authority to do so, should be terminated. In this connexion it is a pity that the Irish Habeas Corpus Act lacks the provision to be found

¹ (1937), 71 I.L.T.R. 225 at p. 233. It is a matter of great regret that Part I of Gavan Duffy’s *Digest of the Criminal and Quasi-Criminal Law*, in which it was his intention to deal at length with such problems as whether pre-1922 British extradition Treaties were binding on the Irish Free State, was never published. Efforts to locate the manuscript of this work, which is believed to exist, have so far been unsuccessful. I think it is possible to sum up this Irish judge’s view of the continued execution in Ireland of British warrants, by saying that he believed it to be a gross infringement of Irish sovereignty as an independent state; he wished to see instead a formal treaty of extradition concluded between the two countries.

² *Parliamentary Debates: Dáil Éireann, Official Report*, vol. 153, col. 1346.

³ *O’Boyle & Rodgers v. Attorney-General & General O’Duffy*, [1929] I.R. 558; (1929), 43 I.L.T.R. 33.

in the English Act providing severe penalties against persons guilty of illegally transporting subjects.

It is also desirable that the Republic should clarify the position in regard to other States. There seems to be some support in official circles in Dublin for the idea of a multilateral extradition treaty, such as is proposed by the Council of Europe.¹ Whatever the advantages of such a treaty would be, it is both possible and desirable that the Irish Republic should make a declaration as to the extent to which she is prepared to recognize the pre-1921 extradition treaties of the former United Kingdom of Great Britain and Ireland as binding upon her. This would in some cases probably be all that is necessary to reinvigorate these treaties; in other cases, and in particular the treaties which provide for the accession of third states who are members of the Commonwealth, an exchange of notes with the governments concerned would reveal whether anything more was required to bring them into force.

In its relations with Great Britain the Republic of Ireland practises a kind of extradition which must surely be unique. There is virtually no judicial control over the surrender of persons between the two countries.² It is a purely administrative function. The only discretion involved is that exercised by the magistrate, district justice or peace commissioner, who issues the original warrant. Any person who is willing to swear an information in writing before a magistrate and can persuade that judicial official to issue a warrant may initiate the machinery which may result in the arrest of the national of another State and his transmittal for trial to a foreign country.³ The local officials have no discretion as to whether or not they should execute the warrant, and habeas corpus proceedings in the local courts will only result in the suspension of the surrender in the rare cases where there is some technical fault in the warrant of arrest.⁴ Judge Sir Hersch Lauterpacht has pointed out that the rules of extradition law are inspired by two motives, namely, international co-operation in the suppression of crime and the safeguarding of certain minimum rights of the individual.⁵ While there is no evidence to suggest that extradition practice between Great Britain and the Republic has in fact led to the infringement of indi-

¹ Cf. F. Honig, 'Extradition by multilateral convention', *International and Comparative Law Quarterly*, 5 (1956), pp. 549-69.

² Cf. J. Mervyn Jones, 'Modern Developments in the Law of Extradition', *Trans. Grotius Society*, 27 (1942), pp. 113-33, at p. 132: 'A judicial hearing is essential to the satisfactory working of any extradition system. . . .'

³ See section I, Magistrates' Courts Act, 1952 (15 & 16 Geo. VI; 1 Eliz. II, c. 55); the only restriction is that the alleged offence must have taken place within the jurisdiction of the magistrate issuing the warrant.

⁴ e.g. as in *The State (Rossi & Blythe) v. Bell* (1956), 91 I.L.T.R. 143.

⁵ *International Law and Human Rights* (London, 1950), p. 31, n. 12. Cf. G. Schwarzenberger, *International Law, vol. 1: International Law as Applied by International Courts and Tribunals* (3rd ed., London, 1957), p. 259.

vidual liberty, the danger is, nonetheless, inherent in the present system and should perhaps be remedied by legislation.

Certain principles are usually found in extradition laws, thus there is usually some limit to the triviality of the offences for which extradition may be granted. Examples of this principle are to be found in the Fugitive Offenders Act, 1881,¹ all the extradition treaties to which the United Kingdom is a party, and the Council of Europe's draft multilateral extradition convention.² There is no limit to the triviality of an offence for which a person may be extradited between Great Britain and Ireland.

Then again there is the principle of double criminality, namely, the act charged must be criminal both by the law of the requesting and of the requested State. There is no provision for the application of this principle to extradition between Britain and the Republic. Similarly, the principle of specialty, namely, that the requesting State may prosecute the person surrendered only for the offence for which he was extradited, has no application here.³ Nor do the authorities of the requested State have any discretion to refuse to surrender a person alleged to be guilty of a political or military offence.⁴ Again, while there have been ministerial expressions of content with the surrender of children and young persons under this system, one may doubt the wisdom of a system which would countenance the removal to a foreign country, and away from their families, of alleged juvenile offenders. Such separation would seem more likely to hinder than aid their rehabilitation.⁵

It is relevant also to point out that this procedure is employed on quite a wide scale. Thus in the year 1957, 109 warrants issued in Ireland were executed in Britain and 89 warrants issued in Britain were executed in Ireland. Since the numbers involved are not insignificant it is important that the procedure should be as free from reproach as possible.⁶

The present arrangement between Britain and Ireland is, no doubt, the result of their very close relationship in the past. Even today, while the Republic of Ireland is a fully independent State, its citizens when in

¹ 44 & 45 Vict., c. 69.

² *Consultative Assembly of the Council of Europe, Sixth Ordinary Session, 1954, Document 234—Report on the Conclusion of a European Convention on Extradition*, chap. I, para. ii: '... There must be some limit to the number of extradictable acts because in the case of minor offences, arrest and deportation constitute a supplementary punishment in excess of that which the offence would have deserved.' Cf. Harvard Research in International Law's Draft Extradition Convention, Article 2 (*American Journal of International Law*, 29 (1935), Supplement).

³ Cf. *Extradition (Germany & Czechoslovakia) case*, *Annual Digest*, 1921, Case No. 182.

⁴ A person guilty of an offence against military law seems to have been surrendered to Britain by Ireland on at least one occasion, see *Parliamentary Debates: Dáil Éireann. Official Report*, vol. 118, cols. 1195-7.

⁵ There have been at least two occasions on which the Republic surrendered children or young persons, see *ibid.*, vol. 144, col. 1285.

⁶ I am indebted for these statistics to a letter from the Secretary of the Department of Justice, Dublin, dated 6 September 1958.

Britain are not regarded as foreigners for legal purposes. The policy of the Governments of the two States seems to be to maintain the closest possible relations compatible with the Republic's independent status. While this policy has much to recommend it, the present arrangement for the mutual surrender of offenders is, as has been pointed out, far from satisfactory, and it would seem that its replacement by an extradition treaty has much to commend it.

APPENDIX

List of pre-1922 U.K. Treaties and information on their applicability to the Irish Republic¹

* Indicates that the treaty concerned is not now in force *vis-à-vis* the U.K.—see *House of Commons Debates*, vol. 545, col. 146.

† Indicates that the State concerned has diplomatic relations with the Republic of Ireland. The treaties assume the existence of diplomatic relations.

†(A) *Argentine Republic*. Treaty of 22 May 1889.²

*†(B) *Austria*. Treaty of 3 December 1893; Declaration of 26 June 1901.³
Memorandum of the competent Austrian authorities sent to the writer by the Austrian Legation to Ireland, dated 8 July 1957: (translation)

‘. . . The Republic of Austria which was established in 1919, did not regard itself as the legal successor to the Austro-Hungarian monarchy but undertook in the Treaty of St. Germain, Article 241, *inter alia*, the obligation to reinvigorate any bilateral treaty whose observance was requested by one of the Allied or Associated Powers. In this case the United Kingdom of Great Britain and Ireland made use of the right thus granted, by a Declaration of 22nd September 1920. As a result, from this day on the Treaty was once more in force between the Republic of Austria and the United Kingdom. As Ireland only obtained independent status as a Dominion on 6th December 1921, between that date and the 22nd September 1920 the treaty included Ireland within its territorial scope.

‘Since the end of the Second World War the Austrian Federal Government has upheld the fundamental principle of Austria's legal continuity. This principle is now enunciated in the Preamble to the Austrian State Treaty, in consequence of which the signatory states, and those states adhering to the State Treaty, have given it international recognition. The Republic of Austria therefore does not regard itself as the “successor” of the Austrian Republic of 1938, but as identical with it.

‘The Austrian Federal Government takes the view that Austria was only occupied by the German Reich in 1938, not annexed. . . . An additional factor of importance is that since its liberation in 1945 Austria treats as being in force all those bilateral treaties which were valid in 1938 before the

¹ This information has been obtained from the diplomatic representatives of the States concerned, for whose assistance I am very grateful.

² *Fugitive Criminal*, pp. 10–18.

³ *Ibid.*, pp. 18–26.

occupation, so far as they have not become obsolete due to altered political, economic and legal conditions. . . . The question as to which particular treaties are still in force is usually settled by an exchange of notes. Such an exchange of notes is however entirely declaratory; it deals solely with the applicability of the treaty and not the question of its being brought into force once more.

'As there has been no case since 1945 which raised the applicability of the said treaty between the Republic of Austria and Ireland, an exchange of notes has not occurred. Therefore the question whether this treaty is in practice applicable is undecided.

'How far, however, the Republic of Ireland feels bound by a treaty entered into by the United Kingdom of Great Britain and Ireland must be left to the judgment of the responsible Irish authorities.'

†(C) *Belgium*. Treaty of 29 October 1901; Supplementary Convention of 5 March 1907; Convention of 3 March 1911.¹

(D) *Bolivia*. Treaty of 22 February 1892.²

Letter from the Bolivian Chargé d'Affaires, a.i., London, dated 15 July 1958:

' . . . regarding extradition relations between Bolivia and the Republic of Ireland, I have pleasure in informing you that a reply has been received from the relative department in my country, to the following effect:

' "The Extradition Treaty between the Government of Bolivia and the United Kingdom and Ireland signed in Lima on the 22nd of February 1892 and amplified by Reversible Notes to the Protectorates and territory under British rule, is still in force." '

(E) *Chile*. Treaty of 26 January 1897.³

Letter from Luis D. Campo, Asesor Jurídico of the Ministry of Foreign Affairs, dated 2 May 1958: (translation)

'1). The Department of Treaties of this Ministry has no preconceptions either in favour of or against the validity of the Extradition Treaty of 1897.

'2). There does not seem to have been any request for the application of the Treaty by Ireland or Great Britain or Chile since the independence of Ireland (1 July 1937).

'3). Neither the Government of Ireland, nor that of Great Britain, nor that of Chile, have expressed any opinion to date as to whether this Treaty is in force or not.'

(F) *Colombia*. Treaty of 27 October 1889.⁴

(G) *Cuba*. Treaty of 3 October 1904.⁵

Letter from Private Secretary to the Cuban Ambassador, London, dated 10 May 1957:

' . . . As far as we understand the Extradition Treaty of 1904 was signed between Cuba and the United Kingdom of Great Britain and Ireland before the independence of Ireland, and therefore it is our belief that this Treaty is no longer in force at the actual moment.'

¹ Ibid., pp. 32-45.

² Ibid., pp. 50-57.

³ Ibid., pp. 64-70.

⁴ Ibid., pp. 71-77.

⁵ Ibid., pp. 78-84.

†(H) *Denmark*. Treaty of 31 March 1873.¹

Letter from the Royal Danish Consul-General in Dublin, dated 12 June 1957 giving the following reply from the Danish Ministry for Foreign Affairs:

- '1) The Danish Government does not consider the Extradition Treaty between Denmark and the United Kingdom of 1873 as being in force between Ireland and Denmark.
- '2) The Treaty in question has as far as is known never been invoked between Ireland and Denmark.
- '3) In accordance with usual principles in international law regarding succession of Treaties entered into, Denmark does not include Extradition Treaties in those groups of treaties which are binding relation to the successor state.'

(I) *Ecuador*. Treaty of 20 September 1880.²

Letter from the Ecuador Chargé d'Affaires, a.i., London, dated 24 July 1957:

'... It is my belief that in accordance with International Law and the traditional opinion of Ecuador, the Government of Ecuador considers this Treaty to be in force between Ecuador and the Republic of Ireland.'

†(J) *France*. Treaty of 14 August 1876; Convention of 13 February 1896; Convention of 17 October 1908.³*†(K) *Germany*. Treaty of 14 May 1872.⁴(L) *Greece*. Treaty of 11/24 September 1910.⁵

The question whether this treaty is in force between Greece and the Republic of Ireland is under consideration by the two Governments—letter from the First Secretary, Greek Embassy, London, dated 2 May 1958.

(M) *Guatemala*. Treaty of 4 July 1885.⁶

Letter from the Chargé d'Affaires, a.i., Guatemalan Legation, London, dated 30 July 1958:

'... inasmuch as Ireland acquired the status of free Republic when it obtained its independence, Guatemala cannot regard the above mentioned treaty as now being in force between Guatemala and the Republic of Ireland, as it was subscribed with Great Britain.'

(N) *Haiti*. Treaty of 7 December 1874.⁷

Letter from the Chargé d'Affaires, a.i., Embassy of Haiti, London, dated 1 May 1957:

'Une partie de l'Irlande s'étant séparée de la Grande Bretagne, du point de vue international, la question des traités a dû être résolu entre ces deux gouvernements au moment ou après cette séparation.'

(O) *Hungary*. Treaty of 3 December 1873; Declaration of 26 June 1901.⁸

Letter from the Hungarian Consul, London, dated 12 September 1958:

'... I wish to inform you that the Extradition Treaty of 3rd December 1873

¹ *Fugitive Criminal*, pp. 93-104.

² *Ibid.*, pp. 110-18.

³ *Ibid.*, pp. 132-46.

⁴ *Ibid.*, pp. 148-54.

⁵ *Ibid.*, pp. 154-61.

⁶ *Ibid.*, pp. 161-9.

⁷ *Ibid.*, pp. 169-74.

⁸ *Ibid.*, pp. 18-26; see also p. 175.

between Austria-Hungary and the United Kingdom of Great Britain and Ireland is in force between Hungary and the Republic of Ireland.'

†(P) *Iceland*. Treaty of 31 March 1873.¹

It is uncertain as to which of the treaties entered by Denmark are regarded by Iceland as binding upon her. The preface to the list of Icelandic treaties published in the annual *Official Manual of the Ministry for Foreign Affairs* states:

'A Personal Union existed between Iceland and Denmark during period 1918-1944. Article 7 of the Act of Union, dated November 30, 1918, provided that Iceland should, where applicable, be bound by published treaties concluded by Denmark prior to December 1, 1918. The applicability of the various treaties dating from that period has not yet been authoritatively examined.'

It is not settled what 'published' means in the above-mentioned Act of Union; whether it means publication in Iceland or in Denmark. Letter from the Icelandic Legation to Ireland, Paris, dated 24 April 1957.

†(Q) *Italy*. Treaty of 5 February 1873.²

Letter from the First Secretary, Italian Legation, Dublin, dated 21 June 1957:

'1) Italy does not regard the Extradition Treaty of 1873 as now in force between the Irish Republic and Italy. There is no agreement providing for the extension to the Irish Republic of the said Convention and it cannot be assumed that Ireland has included it tacitly among her Laws, because it concerns a matter pertaining to the freedom of the individual and as such can only be the object of an international agreement, and, subsequently, of a local law providing for its ratification and consequent execution.

'2) The Treaty of 1873 does not appear to have been invoked between Italy and Ireland. These States can therefore only grant extradition on the basis of reciprocity and in application of their respective criminal and procedure Laws where these provide.

'4) The Italian Government does not regard extradition treaties entered into by Italy as binding not only on the original parties but also on the Successor State to an original party. In this she follows the general doctrine according to which successor States are not held bound by international obligations contracted by their predecessors unless they make an explicit declaration to the contrary.'

(R) *Liberia*. Treaty of 16 December 1892.³

(S) *Luxembourg*. Treaty of 24 November 1880.⁴

Letter from the Counsellor, Luxembourg Embassy, London, dated 1 August 1957, containing reply from Luxembourg Foreign Ministry:

'1. Luxembourg does consider the Extradition Treaty of 1880 between the United Kingdom of Great Britain and Ireland as now being in force between Luxembourg and the Republic of Ireland.

¹ Ibid., pp. 93-101; see also pp. 183-4.

² Ibid., pp. 216-22.

³ Ibid., pp. 229-35.

⁴ Ibid., pp. 242-8.

- '2. This Treaty has not been invoked so far between Ireland and Luxembourg.
- '3. There is no specific Luxembourg policy on the question, as to whether extradition treaties should be regarded as binding not only on the original parties but also any successor state to an original party. The Luxembourg Authorities base their rulings on the international usage and the international law in resolving the problems which might arise in practice.'

In the enclosed observations made by the Luxembourg Foreign Office, they draw attention to the statement made by Mr. de Valera in *Dáil Éireann* on 11 July 1933 referred to in the main body of the article.

(T) *Mexico*. Treaty of 7 September 1886.¹

(U) *Monaco*. Treaty of 17 December 1891.²

†(V) *Netherlands*. Treaty of 26 September 1896.³

Letter from the Netherlands Minister, Dublin, dated 16 July 1958, giving the reply of the appropriate Dutch authorities:

'The formation of the Republic of Ireland meant that the Twenty-Six Counties was regarded as an entirely new state. In such cases it is not the custom for treaties between The Netherlands and another country to be automatically transferred to the new state, and this is never done in the case of an extradition treaty.

'The continuation of such treaties is, in the first place, dependent upon the wishes of the new state. Ireland has never declared herself bound by the Netherlands-British Extradition Treaty of 26th September 1896, and it would therefore appear that such a treaty between Ireland and The Netherlands is not in force.'

(W) *Nicaragua*. Treaty of 19 April 1905.⁴

†(X) *Norway*. Treaty of 26 June 1873; Agreement of 11 February 1907.⁵

(Y) *Panama*. Treaty of 25 August 1906.⁶

(Z) *Paraguay*. Treaty of 12 September 1908.⁷

(AA) *Peru*. Treaty of 26 January 1904.⁸

Letter from the Second Secretary, Peruvian Embassy, London, dated 14 April 1958:

'... as there have been no cases of extradition between Peru and Ireland, the Peruvian Government has made no statements concerning the matter.'

†(BB) *Portugal*. Treaty of 17 October 1892.⁹

(CC) *Roumania*. Treaty of 21 March 1893.¹⁰

* (DD) *Russia*. Treaty of 24 November 1886.¹¹

(EE) *Salvador*. Treaty of 23 June 1881.¹²

(FF) *San Marino*. Treaty of 16 October 1899.¹³

¹ *Fugitive Criminal*, pp. 249-55.

⁴ *Ibid.*, pp. 273-8.

⁷ *Ibid.*, pp. 287-94.

¹⁰ *Ibid.*, pp. 341-8.

¹³ *Ibid.*, pp. 362-70.

² *Ibid.*, pp. 256-63.

⁵ *Ibid.*, pp. 279-80; 387-91.

⁸ *Ibid.*, pp. 294-301.

¹¹ *Ibid.*, pp. 349-55.

³ *Ibid.*, pp. 263-72.

⁶ *Ibid.*, pp. 280-7.

⁹ *Ibid.*, pp. 331-8.

¹² *Ibid.*, pp. 356-62.

- (GG) *Siam (Thailand)*. Treaty of 4 March 1911.¹
- †(HH) *Spain*. Treaty of 4 June 1878; Declaration of 19 February 1889.²
- *†(II) *Sweden*. Treaty of 26 June 1873; Supplementary Agreement of 2 June 1907.³
Letter from the Acting Consul-General for Sweden, London, dated 26 August 1958:
'... I wish to inform you that by a Note of the 24th September 1951 Sweden denounced the extradition treaty of 1873 with regard to the Republic of Ireland.'
- †(JJ) *Switzerland*. Treaty of 26 November 1880; Supplementary Convention of 29 June 1904.⁴
Statement from the appropriate Swiss authorities contained in letter from Swiss Vice-Consul, Dublin, dated 27 June 1957: (translation)
'1. Switzerland is of the opinion that a newly formed State is bound by treaties concluded by another State, having validity for its territory, only when it has made an express declaration to this effect. We do not know whether Ireland has ever made a declaration of a general kind in this respect, to which the Anglo-Swiss Extradition Treaty could be referred. Up to now we know of no special declaration made with respect to this Treaty. On the other hand we think that there is no obstacle to the application of this Treaty between Ireland and Switzerland if the Irish authorities were prepared to make such a declaration.
'2. Since 1939 at least Switzerland has not made a requisition for surrender from Ireland, and has received no requisition from Ireland. Whether, in the period between the separation of the Irish Republic from the United Kingdom and the outbreak of the World War in 1939, there was any application for extradition between the two countries, cannot be decided with any certainty, since up to 1939 the statistics of extraditions were not kept according to the countries concerned. However, at least from the Swiss point of view, it cannot be concluded from this fact, that the Treaty is not regarded as applicable to Ireland.'
- *(KK) *Tonga*. Treaty of 29 November 1879.⁵
- *(LL) *Tunis*. Treaty of 16 May 1878.⁶
- †(MM) *United States of America*. Article X of the Anglo-American Treaty of 1842;⁷ Convention of 12 July 1889; Convention of 12 April 1905; Convention of 13 December 1900.⁸
- (NN) *Uruguay*. Treaty of 26 March 1884; Protocol of 20 March 1891.⁹
- (OO) *Yugoslavia*. Treaty of 6 December 1900.¹⁰

¹ *Ibid.*, pp. 370-6.² *Ibid.*, pp. 376-86.³ *Ibid.*, pp. 387-93.⁴ *Ibid.*, pp. 393-405.⁵ *Ibid.*, pp. 410-11.⁶ *Ibid.*, pp. 412-13.⁷ See Clarke, *Extradition* (4th ed., London, 1903), p. cccxxi.⁸ *Fugitive Criminal*, pp. 413-20.⁹ *Ibid.*, pp. 447-56.¹⁰ *Ibid.*, pp. 457-63.

RATIFICATION OF TREATIES IN SOVIET THEORY, PRACTICE AND POLICY¹

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THE ratification of international treaties has sometimes been regarded by Soviet scholars as an institution inherently alien to Soviet political and governmental concepts, resting as it does on a principle which is rejected by the Soviet system of 'democratic centralism'—the principle, namely, of separation of powers, of checks and balances.² On this view the problem of ratification is not one of 'significance in principle, but primarily of state technique'.³

Under the Soviet governmental system there should never, in theory, occur those internal political struggles over the ratification of important treaties which are familiar phenomena in the history of other States. Since in theory the entire Soviet State structure is organized to carry out a single, unified policy, there is no place for the expression of views at variance with those of the Government, either on the part of public opinion or by an organized political opposition. Accordingly, it might well seem that the ratification of international treaties and the associated governmental processes of review and approval could either be eliminated entirely or be drastically reduced in scope and significance.

In fact, however, practical considerations prevailed over political doctrine. Initially, for reasons of real emergency (during the enforced negotiations for a peace treaty with the Central Powers in 1918), and later for reasons of reciprocity, prestige and expediency, an elaborate technique of ratification and approval was developed by the Soviet Government. In time Soviet scholars developed appropriate theories to justify and explain Soviet practice. It is our purpose in the present paper to sketch the development of Soviet practice and to give an account of the corresponding theories.

¹ This study was written in connexion with the Soviet Treaty Project being conducted at the Hoover Institution on War, Revolution and Peace, Stanford University, under the direction of the authors. The findings of the project are to be published in three volumes, tentatively entitled *Calendar of Soviet Treaties*, *Analysis of Soviet Treaties*, and *Bibliography on Soviet Foreign Policy* (all 1917–57), by the Stanford University Press in the Hoover Institution Documentary Series in 1959–60. The authors acknowledge with particular thanks the work of Mr. Howard E. Koch, Jr., in connexion with the present study.

² Yevgeni A. Korovin, *Sovremennoe Mezhdunarodnoe Publichnoe Pravo* (Contemporary International Public Law) (Moscow, 1926), p. 94.

³ *Ibid.*

I

Before 1925, of about 325 international treaties, agreements and contracts concluded by the Soviet Government relatively few were ratified. If a general rule on ratification could be deduced from the practice in this period, it would probably work out as follows: treaties subject to Soviet ratification were (a) all 'important' treaties, such as peace treaties and other outstanding political treaties; (b) all treaties requiring ratification under the laws of the other signatory; (c) 'important' economic treaties; (d) some, but not all, military treaties; (e) treaties in which ratification was stipulated in the text; and (f) treaties in which ratification was demanded by the co-signatory. A number of exceptions could, however, be found to this rule, and the chaotic general situation in the Soviet polity was unmistakably reflected in a very imperfect institution of treaty ratification.

Not only was it uncertain which treaties should be ratified, but also who should ratify them. There were, it is true, constitutional stipulations which could be interpreted as governing this problem. Article 49 of the Constitution of the Russian Socialist Federated Soviet Republic (R.S.F.S.R.), for example, provided that 'relations with foreign states, the declaration of war and the conclusion of peace', as well as 'making loans, customs and commercial treaties, and financial agreements', were 'within the competence of the All-Russian Congress of Soviets and the All-Russian Central Executive Committee'. These provisions could be understood, *mutatis mutandis*, as authorizing the two bodies to ratify all appropriate treaties.¹ The ratification of treaties of peace, on the other hand, was specifically allocated under Article 51 to 'the exclusive competence of the All-Russian Congress of Soviets'. Law and actual practice, however, were different things; some peace treaties were ratified by the All-Russian Central Executive Committee, others by 'the Government of the R.S.F.S.R.'²

The Treaty of Union of 30 December 1922, by which the Union of Soviet Socialist Republics was formed, clarified the position to some extent. Article 1 (f) stipulated that 'ratification of international treaties' was within 'the competence of the U.S.S.R. exercised by its supreme organs'.³ These

¹ The provisions are so interpreted in T. A. Taracouzio, *The Soviet Union and International Law* (N.Y., 1935), p. 243.

² *Ibid.*, giving examples. The Treaty of Brest-Litovsk was ratified by the Fourth Extraordinary All-Russian Congress of Soviets on 15 March 1918, but was annulled by the All-Russian Central Executive Committee on 13 November 1918. Towster points out that it was the Central Executive Committee which ratified the treaties between Russia and Turkey of 16 March 1921, Russia and Persia of 26 February 1921, and Russia and Bukhara of 4 March 1921, following a presentation by the Commissar of Foreign Affairs, G. V. Chicherin. Julian Towster, *Political Power in the U.S.S.R., 1917-1947* (N.Y., 1948), p. 239.

³ The Treaty of Union was itself ratified by the Central Executive Committee of the U.S.S.R. and put into effect on 6 July 1923. Considerably enlarged, it was 'definitively' ratified by the Second Congress of Soviets of the U.S.S.R. on 31 January 1924 as Section Two of the Soviet Constitution. See the note in *Mezhdunarodnoe Pravo v Izbrannykh Dokumentakh* (International Law in Selected Documents) (Moscow, 1957), vol. i, p. 38.

organs were defined in Article 2 as 'the Congress of Soviets of the U.S.S.R. and, during intervals between congresses, the Central Executive Committee of the U.S.S.R.' The 1923 Soviet Constitution repeated without change the provisions of the Treaty of Union concerning ratification—that it was to be carried out by the 'supreme organs of the U.S.S.R.', the Congress of Soviets and, between its sessions, by the Central Executive Committee.

According to Articles 17 and 29 of the Constitution, the Presidium of the Central Executive Committee was substituted for the Committee when that body was not in session in all matters not specifically reserved by the Committee. Consequently, unless the Committee placed a particular restriction upon the Presidium, the latter body also was empowered to ratify all treaties. The Council of People's Commissars, on the other hand, 'the executive and administrative agency of the Central Executive Committee' (Article 37), was not classed as a 'supreme agency', and was not, therefore, empowered to ratify treaties. The actual functions of the Presidium and the Council, however, were not specified in the Constitution except in general terms and under the treaty-making procedure, as it developed in practice, the Council of People's Commissars did play a certain role. Drafts of all treaties were submitted to the Council for preliminary consideration: 'more important' treaties were then forwarded for ratification to the Presidium, while 'less important' treaties were 'confirmed' by the Council itself.¹

A statute of 12 November 1923 legalized this extra-constitutional practice by providing that 'examination of treaties and agreements with the governments of foreign states and *confirmation of those which do not call for ratification*' fell within the competence of the Council of People's Commissars.² Which, however, were the treaties subject to confirmation? Soviet treaty practice did not cast much light on this question, except that, in general, treaties subject to confirmation were 'less important' than treaties subject to ratification but 'more important' than treaties which became valid by virtue of simple signature. Needless to say, the criterion of 'importance' depended on many variables—subject, partner, time of conclusion, general political situation, &c.—and its usefulness for any generalization was limited. The new law, as Durdenevski pointed out, 'failed to eliminate a considerable number of other perplexities' involved in the interpretation of Article 1 of the Constitution.³

Thus, before 1925, the uncertainty concerning ratification and con-

¹ V. Durdenevski, 'Mezhdunarodnye Dogovory v Konstitutsionnom Prave Soiuzs S.S.R.' (International Treaties in the Constitutional Law of the Soviet Union), *Sovetskoe Pravo*, 4 (1925), p. 17.

² *Sobranie Uzakonenii i Rasporiazhenii Rabocheho i Krest'ianskogo Pravitel'stva R.S.F.S.R.* (1923), i, No. 107, Article 1032 (italics added). Paragraph 3 (f) of the statute empowered the Council to 'review and confirm concessionary treaties'. Source hereinafter cited as *S.U.*

³ Durdenevski, loc. cit., p. 18.

firmation of treaties was complete. Not only was it unsettled which treaties were to be ratified and which were the organs to ratify them, but the ratification procedure itself was left in the air. If the Presidium of the Central Executive Committee ratified a treaty, for example, should not that Committee, once in session, approve such ratification? On whose authority should credentials to the Soviet representatives be issued in the case of treaties (*a*) to be ratified, and (*b*) to be confirmed by the Council of People's Commissars? The almost absolute lack of legislative measures on treaty ratification—and on the conclusion of treaties in general—made it difficult for Soviet diplomacy to handle the many perplexing problems of treaty-making except on an entirely pragmatic basis.

II

This unsatisfactory situation led the People's Commissariat of Foreign Affairs (N.K.I.D.) in October 1924 to initiate a series of steps designed to bring about federal legislation dealing comprehensively with the conclusion of international treaties. The question exactly which treaties should and which should not be ratified was raised by the N.K.I.D. in a draft supplement to the Statute of the Commissariat which had been promulgated on 12 November 1923.¹ The supplement was to contain, essentially, new norms for the conclusion of treaties by the Central Executive Committee, as well as provisions for a technical procedure for the appointment of Soviet treaty negotiators. The bone of contention was the line of differentiation between treaties subject to ratification and those not requiring ratification. Having considered the N.K.I.D.'s proposals, the Council of People's Commissars, on 18 November 1924, requested the N.K.I.D. to redraft them and to concentrate primarily on the bases for future treaty ratification. The N.K.I.D. accordingly submitted to the Council, on 9 January 1925, a new draft supplement, under which all Soviet treaties were to be divided into two groups: (*a*) those subject to ratification, which were to be concluded on behalf of the Central Executive Committee and ratified either by that Committee or by the Presidium of that Committee, and (*b*) all other treaties, which were to be placed within the competence of the Council of People's Commissars, both with respect to their conclusion and their subsequent approval. In elaborating its criterion for dividing treaties into these two categories the N.K.I.D. took into consideration the constitutional laws of Western States concerning ratification of treaties, the increasing demand for flexibility and speed in the external affairs of the Soviet State, and improvements in communications and transportation, which facilitated and speeded up exchange of information between the plenipotentiaries and the Soviet Government.

¹ *S.U.* (1923), ii, No. 107, Article 1033.

The proposals of the N.K.I.D. were then cast into the form of three decrees, two of which became law on 21 May 1925 and the third on the following day. Since these decrees established the first uniform Soviet legislation on ratification, it is necessary to consider them in some detail.

The first decree of 21 May 1925, 'On the procedure for conclusion and ratification of international treaties of the U.S.S.R.' provided in paragraph 2 that:

'treaties and agreements subject to ratification are to be those concerned with the conclusion of peace, alteration of the boundaries of the U.S.S.R., and treaties which require ratification according to the laws of the country with which the treaty is being concluded.'¹

Paragraph 1 of the decree specified the governmental organs in whose name treaties on behalf of the Soviet Union were to be concluded:

'International treaties and agreements of the U.S.S.R. subject to ratification according to paragraph 2 of the present decree, are concluded in the name of the Congress of Soviets of the U.S.S.R., if the decree on their conclusion was adopted by the Congress of Soviets of the U.S.S.R., and in the name of the Central Executive Committee of the U.S.S.R. in other cases.

'International treaties and agreements which do not require ratification are concluded in the name of the Council of People's Commissars of the U.S.S.R.'

The second decree, in form a modification of the Statute of the Central Executive Committee, stipulated that:

'the Presidium of the Central Executive Committee of the U.S.S.R., in the intervals between sessions of the Central Executive Committee of the U.S.S.R., has the right to ratify international treaties and agreements.'²

In this way the unconstitutional practice of the Presidium, which had formerly ratified treaties with the *post facto* approval of the Central Committee,³ was legalized and the Presidium became the third supreme organ of the Soviet Government within the meaning of Article 1 of the Constitution. To Durdenevski, this was a proof of the new significance of ratification in Soviet treaty-making: 'Since in all cases ratification now rests on the constitutional prerogative of each of the three organs which are authorised to perform it, it definitely has an equivalent and *decisive* character.'⁴

We have already mentioned the jurisdiction of the Council of People's Commissars with respect to the confirmation of treaties which do not call

¹ *Sobranie Zakonov i Rasporiazhenii . . . S.S.S.R.* (1925), i, No. 35, Article 258. Source hereinafter cited as *S.Z.* As Durdenevski pointed out, 'This is the obligatory minimum for treaties which are to be ratified, but it does not, of course, exclude the possibility of a provision on "ratification" in the text itself of any treaty or agreement'; loc. cit., p. 24.

² *S.Z.* (1925), i, No. 35, Article 257.

³ On 24 October 1924, for example, the C.E.C. simply 'approved the activity' of the Presidium of the C.E.C. in ratifying a number of treaties between sessions of the C.E.C.: *S.Z.* (1924), i, No. 19, Article 183. The treaties involved, which were characterized as being 'of substantial importance to the Workers' and Peasants' State', included trade treaties with Italy and Sweden and the significant Soviet-Chinese Agreement on General Principles of 31 May 1924.

⁴ Durdenevski, loc. cit., p. 25 (italics in the original).

for ratification. It is now necessary to define confirmation of treaties as understood in the Soviet Union, and show in what way it differs from ratification. Approval or confirmation (*podtverzhdienie* or *utverzhdienie*) of treaties is an institution well known to western customary law. Soviet diplomats and lawyers agree that it is closely analogous to ratification.¹ In the Soviet Union during the period under discussion, confirmation differed from ratification *formally*, as being a simpler, less solemn, one-stage procedure, and *effectively*, in that confirmation was referred to the Council, a lesser body than the Presidium. Thus, while ratification required two acts, first by the Council and, secondly, by the Presidium, confirmation was exclusively within the competence of the Council.²

Any decree of the Council of People's Commissars, under Articles 31 and 41 of the 1923 Constitution, could be suspended or abrogated by the Central Executive Committee or its Presidium; consequently, it would seem, a decree of treaty confirmation passed by the Council could be erased by either of the two superior bodies at any time. Did these constitutional provisions render treaty confirmation 'merely a precarious provisional act'? No, answered Durdenevski:

'By granting the Council of People's Commissars the right, in the statute of November 12, 1923, to "confirm" certain treaties, the Central Executive Committee thereby recognised that confirmation, given within the limits of the competence of the Council, makes the treaty definitive, conclusive, and *established*: to admit anything else would be to contradict the meaning of the word "to confirm". But since this is so, the "abrogation of the decree on confirmation" loses its meaning, since it cannot eliminate the fact that a treaty was concluded and operated, even if only for a short time. It would be the equivalent of annulling a treaty and terminating its action—and, of course, under extraordinary circumstances, the Central Executive Committee can annul any treaty, even one which has been ratified or one which came into force from the moment it was signed. The possibility that such an extraordinary annulment of a treaty may occur does not make the act of conclusion precarious.'³

Besides, argued Durdenevski, not only was any breach of treaties of this kind on the part of the Soviet Union 'improbable' because of the 'practical inconveniences' which would follow such a breach, but, should there be

¹ The lack of a clear substantive distinction between 'confirmation' and 'ratification' in early Soviet usage is indicated by the fact that they were originally used interchangeably. (See, for example, the decree of ratification of the Soviet-Estonian Peace Treaty of 2 February 1920 in *S.U.* (1920), No. 9, Article 53.) Later the two terms were used together in the frequently employed formula, 'After consideration of [a given treaty], the Central Executive Committee has confirmed and ratified it . . .'. See, for example, the decree of 29 October 1925 concerning ratification of the communications treaties with Finland of 27 June 1924 in *S.Z.* (1927), ii, No. 1, Article 1.

² In actual practice, of course, the opinion of the Council was of great significance; e.g. when the R.S.F.S.R. refused to ratify the commercial treaty with Italy of 24 May 1922, the advice of the Council was significant, if not decisive. See Durdenevski, *loc. cit.*, p. 25.

³ *Ibid.* (italics in the original). One notes with interest the opinion of a Soviet scholar that an executive agency of the Soviet Government could, under certain circumstances, abrogate a treaty which had been not only signed but duly ratified.

lack of complete agreement between the Council of People's Commissars and the Central Executive Committee in regard to a given treaty, the fact would be discovered and provided for in the Council's preliminary examination of the treaty. Nevertheless, to be on the safe side, there was enacted, on 15 June 1927, an amendment to the decree of 21 May 1925. The amendment provided:

'International treaties and agreements which have been ratified by the Central Executive Committee of the U.S.S.R., or ratified before the formation of the U.S.S.R. by the Central Executive Committees of the Union Republics, shall be denounced by the Central Executive Committee of the U.S.S.R.

'International treaties and agreements which have been confirmed by the Council of People's Commissars of the U.S.S.R., or confirmed before the formation of the U.S.S.R. by the Councils of People's Commissars of the Union Republics, shall be denounced by the Council of People's Commissars of the U.S.S.R.'¹

The third decree, which was enacted on 22 May 1925, provided that credentials to Soviet plenipotentiaries were to be issued by the Central Executive Committee or its Presidium for negotiation of treaties subject to ratification, and by the Council of People's Commissars for negotiation of all other treaties.²

Before attempting to evaluate the 1925 reforms, mention must be made of the Council of People's Commissars' function of submitting treaties to preliminary examination. Precedents for this procedure were a decree of the Little Council of People's Commissars of 24 January 1921 concerning the necessity of consent on the part of the People's Commissariat of Foreign Trade for all draft trade treaties, and its decree of 21 April 1921 concerning the procedure for the preparation of treaties with foreign States, which provided that all treaties of the R.S.F.S.R. must be approved before signature, by the Council of People's Commissars.³ Only the Council could authorize the N.K.I.D. to introduce amendments to the approved treaty text ('for the benefit of the R.S.F.S.R.') during the negotiation. In this way, and in agreement with western practice, the Soviet Government exercised control over the preliminary treaty negotiations. Later, after the formation of the U.S.S.R., responsibility for the technical preparation of treaty negotiations was assigned to the Commission on Legislative Proposals, while financial questions concerning future treaties were referred to the Administrative-Financial Commission.

On the basis of this experience, there was enacted, on 2 October 1925,

¹ *S.Z.* (1927), i, No. 40, Article 393. The title of the 21 May 1925 decree was amended at the same time to 'Decree on the procedure for conclusion, ratification (confirmation) and denunciation (declaration of termination of validity) of international treaties of the U.S.S.R.'

² *S.Z.* (1925), i, No. 34, Article 233.

³ Durdenevski, loc. cit., p. 27, citing *Protokoly M.S.N.K.* (Protocols of the Little Council of People's Commissars) (1921), Nos. 622, 664 and 665.

a decree 'On the procedure for submitting international treaties and agreements concluded in the name of the U.S.S.R. to the Government of the U.S.S.R. for its approval, confirmation and ratification', which provided:

- '(1) Treaties and agreements concluded with foreign states, before being signed in the name of the U.S.S.R., shall be submitted by the People's Commissariat of Foreign Affairs to the Council of People's Commissars of the U.S.S.R. for preliminary approval.
- '(2) Preliminary approval (Paragraph 1) is accomplished through the following procedure:
 - (a) In cases where plenipotentiaries of the U.S.S.R. intend to introduce their draft of a treaty or agreement, this draft or its basic provisions shall be submitted by the People's Commissariat of Foreign Affairs to the Council of People's Commissars of the U.S.S.R. before the commencement of formal talks with the plenipotentiaries or delegates of the corresponding states;
 - (b) In cases where, at the commencement of negotiations, the plenipotentiaries of the U.S.S.R. do not intend to introduce their own draft, the draft (or its essential provisions) submitted by the plenipotentiaries of the other contracting party, with the appropriate comments concerning it made by the plenipotentiaries of the U.S.S.R., or the counter-draft or counter-proposal of the plenipotentiaries of the U.S.S.R., shall be submitted to the Council of People's Commissars.
 - (c) After the draft of the appropriate treaty or agreement has been finally agreed upon with the plenipotentiaries of the other party, the approved drafts shall be sent by the plenipotentiaries of the U.S.S.R. to the People's Commissariat of Foreign Affairs. After consideration of the documents submitted, the People's Commissariat of Foreign Affairs shall either inform the plenipotentiaries of the U.S.S.R. that the text which has been drawn up may be signed, or, if in the process of discussion of the draft basic changes have been introduced into it in comparison with the text or with the basic provisions approved by the Council of People's Commissars, it shall submit the final text to the Council of People's Commissars of the U.S.S.R. for a second examination and approval.
- '(3) Treaties and agreements with foreign states signed by plenipotentiaries of the U.S.S.R. shall be submitted by the People's Commissariat of Foreign Affairs to the Council of People's Commissars of the U.S.S.R. with the purpose of:
 - (a) informing the Council of People's Commissars of the signing of documents which enter into effect by virtue of the very fact of signature;
 - (b) examining treaties and agreements with the governments of foreign states, and confirming those which do not require ratification;
 - (c) examination of documents requiring ratification by the Council of People's Commissars of the U.S.S.R. and subsequent transmission of them for ratification by the Congress of Soviets of the U.S.S.R., the Central Executive Committee of the U.S.S.R., or its Presidium.¹

¹ S.Z. (1925), i, No. 68, Article 503. The remaining two paragraphs of the decree provide that (a) the provisions of paragraphs 1 and 2 do not apply to plenipotentiaries with unlimited powers, and (b) in the case of the adherence of the U.S.S.R. to an already existing international convention, the N.K.I.D. shall submit a draft decree on adherence to the Council of People's Commissars, which if approved shall then be legally promulgated.

At this preliminary stage, then, the Council of People's Commissars decided which treaties should be concluded directly, which should be confirmed, and which ratified, and it was usually at this time that the requirement of 'ratification according to the laws of the country with which the treaty is being concluded' was recognized. Similarly, at this stage, the Soviet request for re-examination could be made, should the treaty, for example, conflict with Soviet laws. In other words, the preliminary examination injected some flexibility into the otherwise rigid process of determining concretely which treaties should be ratified and which confirmed.

We may conclude, then, that the 1925 legislation answered a number of pressing questions concerning the conclusion of treaties. In particular, (a) it stipulated which treaties were subject to ratification—those of peace or of boundary changes, and those ratified on the basis of reciprocity; (b) it developed the institution of treaty confirmation in a rather broad and flexible fashion, and left the determination of which treaties were to be subject to confirmation largely in the hands of the Council of People's Commissars; (c) it added to the Central Executive Committee and the Congress of Soviets, the Presidium of the Central Executive Committee as a third 'supreme organ' which was empowered to ratify international treaties. Soviet ratification was to be performed, in Durdenevski's words,

'... by "sovereign plenipotentiary representatives of the toiling masses", single in principle, but in time manifesting itself in three different forms—Congress, Executive Committee and its Presidium. . . . It may be objected that, practically speaking, the ratifying assembly is the Presidium, which possesses a number of the customary attributes of the "chief of state" [such as the right of diplomatic representation, of awards, of pardon, of supervision of the activity of the entire state apparatus, etc.]. For this reason it [the Presidium] can be considered the permanent "head" of the Soviet Union. But both the Presidium and the Central Executive Committee and the Congress possess prerogatives which are far broader than those of foreign monarchs and presidents operating in a parliamentary framework. These prerogatives extend from a combination of *legislative*, administrative and executive authority in the Presidium to the plenitude of all authority, including constituent authority, in the Congress; the idea of dictatorship, of "concentration of authority", characteristic of the Soviet system is undoubtedly manifested in this position of the supreme complex body which cannot be identified with a legislative assembly and cannot be considered merely a formal "chief of state".'¹

The 1925 legislation, it is to be observed, empowered the Council of People's Commissars to decide the fate of the great majority of Soviet treaties (with respect to the question of their confirmation or entry into force upon signature) by authorizing that body to submit *all* Soviet treaties to preliminary examination.

¹ Durdenevski, loc. cit., p. 26. The quotation in the first line is from the 1918 Constitution of the R.S.F.S.R. (italics in the original).

Such, then, was the practical solution found for the time being to the questions which treaties should be ratified, which should be confirmed, by whom and how. The distinctive—and far from ideological—Soviet system of treaty ratification had been established on legal foundations. Before turning to the subsequent legislation, we may pause to consider why the various processes of treaty review—consideration in the Council of People's Commissars, confirmation and ratification—took such firm hold in Soviet practice, despite their seeming irrelevance to the underlying Soviet theory of government.

Two tentative answers to this question may be suggested, one deriving from internal politics, the other from foreign policy. The mid-1920's were a period during which the struggle for power inside the Communist Party mounted towards a climax after Lenin's death. Far from presenting a picture of complete ideological unity, the Communist Party was split into bitterly warring factions, each aiming at hegemony and the right to speak in the name of the Party. In this situation it is significant that the diplomatic service of the N.K.I.D. came to serve as a place of unacknowledged exile for members of the Opposition. Soviet ambassadors and diplomats were frequently in the position of being not fully trusted by the ruling group, who found it desirable to supervise their activities closely and keep them under strictly centralized control. The procedure of review of all treaty drafts in the Council of People's Commissars effectively met this requirement.

In the field of foreign policy, the Soviet leaders came to recognize in ratification a lever for exerting pressure on foreign governments during the course of treaty negotiations. The Soviet Government could, for example, refuse to ratify an already negotiated treaty in retaliation for policies of the other signatory which it viewed as unfriendly.¹ Or it could delay ratification of a treaty pending the favourable solution of questions under negotiation with a foreign government.² Thus expedience and practical politics proved more compelling than the arguments of ideology.

¹ The case of the non-ratification of the Soviet-Italian commercial treaty of 24 May 1922 has already been cited. A similar case occurred in October 1922, when the Council of People's Commissars rejected a draft concessionary agreement negotiated by Krassin with a British syndicate. (*S.U.* (1922), i, No. 62, Article 806). Notwithstanding its view that the draft agreement was 'desirable', the Council stated that British policy towards Soviet Russia in regard to affairs in the Middle East and the Black Sea made the overall conditions for conclusion of the agreement unfavourable.

² An example of this procedure occurred in November 1923 when the Central Executive Committee empowered its Presidium to defer ratification of a treaty with Finland concerning navigation of the Neva (signed on 5 June 1923) until a favourable moment in the course of negotiations with Finland in regard to settlement of a dispute over the murder of two Communists and the question of security guarantees for Soviet Karelia (*S.U.* (1923), ii, No. 113, Article 1051).

III

The 1925 solution of the problem of ratification endured for a decade, but was then modified in the years 1936-8. The Soviet Government of the middle and late 30's had different hopes and fears from the Soviet Government of the early 20's, and the new legislation was conceived of as an integral part of a new Soviet foreign policy with its heavy emphasis on collective security and resistance to aggression.

True, it remained accepted doctrine that 'the only socialist State in the world' was 'forced to conclude international treaties and agreements with capitalist states', and that 'inescapably, under the circumstances of capitalistic encirclement, the contracting partners of the U.S.S.R. are the bourgeois states'.¹ But in Soviet eyes the world situation had deteriorated immensely. Since 1925:

'... violation of international obligations and crude trampling upon them have become commonplace in international life. One may claim outright that the basic international treaties, which defined international life in the post-war period, have been either abolished or violated in the crudest fashion, with threats and violence.

'International events of the recent period present a picture of the gradual, systematic abolition of international order, created as a result of the World War, and the annulment of the most important post-war international treaties. . . .'²

In these new conditions, the Soviet Union expressed itself as ready 'to demonstrate strikingly' to the whole world that

'... the socialist state ascribes extraordinary significance to the international obligations it has assumed, and that it protects and guarantees their fulfilment with all the resources of its power.'³

In short, it sought to give a lesson to the capitalist world on the proper observation of obligations assumed through international treaties.

The 1936 (Stalin) Constitution contained the first part of the 'lesson'.⁴ Article 14 again entrusted to the supreme organs of the U.S.S.R. the ratification of treaties:

'The jurisdiction of the Union of Soviet Socialist Republics, as represented by its highest organs of state authority and organs of government, covers:

- (a) Representation of the Union in international relations, conclusion and ratification of treaties with other states;
- (b) Questions of war and peace.'

¹ M. Plotkin, 'O Sile Mezhdunarodnykh Ob'iazatel'stv' (On the Force of International Obligations), *Sovetskoe Gosudarstvo*, 5 (1938), p. 71. The passage quoted is from a summary of the speech of O. Yu. Shmidt, Deputy to the Supreme Soviet from Kazan Okrug, who presented the report on the draft of the 1938 ratification decree.

² Ibid.

³ Ibid., p. 72.

⁴ 'The principle of steadfast observance of international treaties is the logical continuation and expression of the moral-political unity of the Soviet people and of the consistently peaceful

Article 31 then provided that the Supreme Soviet of the U.S.S.R. should exercise the powers referred to in Article 14, in so far as they do not, by virtue of the Constitution, come within the jurisdiction of other organs. Ratification of international treaties was, however, expressly made one of these exceptions; for Article 49 provided that the Presidium 'ratifies international treaties'.¹

The revised constitutional superstructure, without supporting columns of more particular laws, left much unsettled. On 20 August 1938, therefore, at a joint session of the Soviet of the Union and the Soviet of Nationalities, a special law 'On the procedure of ratification and denunciation of international treaties of the U.S.S.R.' was enacted. It is this law which governs Soviet ratification at the present date.²

Article 1 of the new law restated the 1936 constitutional provisions concerning ratification, making it the exclusive prerogative of the Presidium of the Supreme Soviet. Article 2 substantially modified the list of treaties subject to ratification; it made ratification necessary not only for peace treaties, but also for treaties of mutual assistance against aggression, treaties of mutual non-aggression, and treaties which the contracting parties agreed were to be ratified. In the new list of treaties to be ratified, then, the change-of-boundary category was omitted, while the reciprocity clause of the 21 May 1925 decree, which stipulated that all treaties requiring ratification in accordance with the law of the other contracting party were also subject to Soviet ratification,³ was altered so as to require ratification only for those treaties which *both* parties agreed to make subject to ratification. This was thought to be enough to uphold the prestige of the socialist State, and it left Soviet diplomats free to try to persuade their foreign colleagues to agree to the ratification of treaties which were of particular interest to the Soviet Union. Trade treaties, for example, which introduced Soviet innovations such as the state monopoly of foreign trade, diplomatic

foreign policy conducted by the Soviet Union. The principle of steadfast observance of international treaties reflects the ideal of legality, elevated to unprecedented heights in our country and consolidated in the Stalin Constitution.' O. E. Polents, *Ratifikatsiia Mezhdunarodnykh Dogovorov* (Ratification of International Treaties) (Moscow, 1950), p. 4.

¹ Because of their 'extraordinary significance', however, it was not the Presidium but the Supreme Soviet itself which ratified the Soviet-German Treaty of Non-aggression of 23 August 1939 and the Soviet-British Treaty of Alliance of 26 May 1942. See Krylov, 'Traité International', *Recueil des Cours*, 70 (1947), p. 438. As examples of treaties ratified by the Presidium may serve the peace treaties with Italy, Roumania, Hungary, Bulgaria and Finland of 10 February 1947; the Danube Convention of 18 August 1948; the Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; the Warsaw Pact of 14 May 1955; the State Treaty with Austria of 15 May 1955; and the Charter of the International Agency on Atomic Energy of 26 October 1956. See also F. I. Kozhevnikov, ed., *Mezhdunarodnoe Pravo* (International Law) (Moscow, 1957), p. 262.

² *Vedomosti Verkhovnogo Soveta S.S.S.R.* (Bulletin of the Supreme Soviet of the U.S.S.R.), 11 (1938).

³ A provision which 'made our ratification dependent on the ratification of the treaty by the other country'. Plotkin, loc. cit., p. 74.

immunities and privileges for Soviet trade delegations abroad, most-favoured-nation clause and national régime clause (both favoured by the Soviet Union for a variety of good reasons) could now, on Soviet initiative, be made subject to ratification by both parties.¹

The major change, however, consisted in adding two new categories of treaties to those subject to Soviet ratification, treaties of mutual assistance against aggression, and treaties of non-aggression. This provision was designed to meet the challenge of the new international situation which the Soviet Union faced:

'The international situation has essentially changed since 1925-27. Aggression, political banditry and violence in all forms and shapes have entered upon the international arena. Correspondingly there has also been intensified the struggle of the Leninist-Stalinist foreign policy for peace and security, for unification of the forces of progressive humanity against fascist aggression. The Soviet government has advanced new institutions of peace: pacts of non-aggression, pacts of mutual defence against aggression. These measures are reflected in the listing found in Article 2 of the new law.'²

Moreover, the new law was supposed to strengthen paragraph K of Article 49 of the 1936 Constitution, which laid down that between sessions of the Supreme Soviet, the Presidium of the Supreme Soviet was empowered to declare war 'in the event of armed attack on the U.S.S.R. or whenever necessary to fulfil international treaty obligations concerning mutual defence against aggression'.

Article 2 of the new law thus broadened the group of treaties subject to Soviet ratification and provided for two kinds of treaties: (a) treaties subject to Soviet ratification absolutely, and (b) treaties subject to ratification by mutual agreement of the parties.³ It omitted the change-of-boundary treaties—which in past Soviet practice had been of little import—and laid stress on the security criterion of Soviet foreign policy so characteristic of the time.

The new law also provided that only the organ which ratified a treaty was authorized to annul or denounce it; thus only the Presidium of the Supreme Soviet could denounce international treaties which it had ratified.

The 1938 law left without change the competence of the Council of People's Commissars to make a preliminary examination of *all* treaties, to confirm the more important ones, and to denounce those treaties which

¹ See, for example, the Soviet trade treaties with China of 16 June 1939; with Iran of 25 March 1940; with Poland of 7 July 1945; with France of 29 December 1945; with Denmark of 17 August 1946, and with Roumania of 20 February 1947.

² Plotkin, *loc. cit.*, p. 74.

³ The term 'absolutely' may be misleading, however, in view of subsequent Soviet practice. During the Second World War a number of Soviet treaties which were essentially treaties of mutual assistance against aggression (and thus subject to ratification) entered into force immediately upon signature. See the treaties with the United Kingdom of 12 July 1941, with Czechoslovakia of 18 July 1941, and with Poland of 30 July 1941.

they had confirmed.¹ It was silent, however, as to the conclusion of treaties. The practice which developed subsequently suggests that treaties to be ratified by the Presidium of the Supreme Soviet were concluded in the name of the Presidium, which issued the authorization for the conclusion of such treaties. Similarly, treaties subject to confirmation by the Council of People's Commissars were concluded in the name of the Council by negotiators authorized by that body. In other words, the provisions of the 1925 legislation on the subject appear to have continued virtually unchanged.²

This, then, was all the Soviet 'lesson' to the external world. Procedurally, it contained nothing new; for the highly centralized Soviet Union merely copied the well-established practice of the Western democracies.

To complete the survey of the Soviet legislation concerning ratification, two additional measures must be mentioned:

(a) By a decree of the Presidium of the Supreme Soviet of the U.S.S.R. of 26 April 1940, the decree 'On the procedure for conclusion and ratification of international treaties of the U.S.S.R.' of 21 May 1925, together with all subsequent changes and additions, was annulled.³ The provisions of the 1925 legislation with regard to the *conclusion* of treaties, however, were not affected, and, as we have seen, continued to determine Soviet practice.

(b) A law of 1 February 1944 amended the 1936 Constitution by giving the right to the Union Republics to enter into direct diplomatic relations with foreign States, permitting them to conclude international treaties on their own behalf.⁴ In pursuance of this law, several of the Union Republics subsequently concluded and ratified a number of treaties through the Presidia of their Supreme Soviets.⁵

IV

We now turn to the juridical significance of ratification in Soviet theory and practice. Ratification is defined in the U.S.S.R. as the solemn approval

¹ Under Article 64 (g) of the 1936 Constitution, furthermore, the Council 'exercises general guidance with regard to relations with foreign states'.

² For procedure in this matter as of 1945, see V. P. Potemkin, ed., *Istoriia Diplomatii* (Moscow-Leningrad, 1945), vol. iii, p. 807, which adds that the credentials of both types of treaty negotiators required the signature of the Commissar of Foreign Affairs.

³ *Vedomosti Verkhovnogo Soveta S.S.S.R.* 14 (1950).

⁴ *Ibid.* 8 (1944).

⁵ The Charter of the United Nations was ratified by the Presidium of the Supreme Soviet of the Ukrainian S.S.R. on 22 August 1945 and by the Presidium of the Supreme Soviet of the Belorussian S.S.R. two days earlier. The Ukrainian S.S.R. also ratified three International Labour Organization Conventions (No. 29 on forced labour, No. 47 on the length of the working week, and No. 100 on equal pay for men and women) on 9 July 1956; *Izvestiia*, 10 July 1956. For other treaties ratified by the Union Republics, see p. 333, n. 1, below. There have been only a few treaties actually concluded by the Union Republics themselves, notably the agreements between the Polish National Committee of Liberation and the Lithuanian, Belorussian and Ukrainian S.S.R.s in September 1944, regarding evacuation of population, and a subsequent Ukrainian-Polish protocol of 6 May 1947, marking the completion of the operation in regard to the Ukraine.

of an international treaty concluded by the supreme organs of the State, followed by the exchange of ratification documents with the treaty partner or partners.¹ As to the nature of ratification, Soviet legal doctrine considers 'incorrect', and rejects, the theory that ratification is simply declaratory and does not create a treaty; instead, it views the act of ratification, by which 'the head of a state realises his will, and gives to the treaty the force of law', as a *constitutive* act.²

Soviet authors strive to impart to the institution of ratification political interpretations, seeing in Soviet ratification a progressive and peace-loving quality, in that of other States a reactionary and aggressive character. Thus in the West, according to Soviet authors, the institution of ratification is determined by the conditions in which the 'law of ratification is carried out by organs of the bourgeois dictatorship, organs which in no way reflect the will of the popular masses', while in the Soviet Union the institution of ratification (and indeed 'all foreign as well as internal policy') is carried out 'under the control of the people through the Supreme Soviet of the U.S.S.R., the Supreme Soviets of the Union Republics, and their Presidia'. Ratification in the Soviet Union is thus said to be performed 'by organs which express the will of the people and which are subject to control by the masses of the people'; consequently, 'the democratic character' of Soviet ratification can scarcely be doubted.³

On the other hand, international treaties concluded and ratified by the capitalist countries, say Soviet authors,

'have a clearly expressed imperialistic character and are usually employed as a means for the coercion and oppression of small and weak peoples. The ratification of the aggressive, reactionary North Atlantic Treaty, hostile to the broad popular movement which opposed the conclusion of this treaty in all countries in the world, may serve as the clearest example of an anti-democratic, imperialistic act of ratification in bourgeois countries.'⁴

Another example often cited in Soviet textbooks of ratification 'employed by capitalist countries against the U.S.S.R. for purposes of pursuing an aggressive reactionary policy', is the ratification by Italy of 'the annexationist treaty' of 28 October 1920 (the Peace Treaty between Roumania and the Western Allies, which recognized Roumania's annexation of Bessarabia).⁵

¹ Polents, op. cit., p. 7; Kozhevnikov, *Sovetskoe Gosudarstvo i Mezhdunarodnoe Pravo* (The Soviet Government and International Law) (Moscow, 1948), p. 227; Korovin, op. cit., p. 94.

² V. I. Lisovski, *Mezhdunarodnoe Pravo* (International Law) (Kiev, 1955), p. 241.

³ Polents, op. cit., pp. 5-6; see also p. 11. The institution of ratification in the Soviet satellite states is, of course, equally said to be 'democratic and progressive'. Ibid., pp. 36-37.

⁴ Ibid.

⁵ F. I. Kozhevnikov in Korovin, ed., *Mezhdunarodnoe Pravo* (1951), p. 406.

V

Is refusal to ratify, in the Soviet view, a hostile act *per se*? According to Soviet doctrine, a State is not legally obligated to ratify a treaty concluded by its plenipotentiaries. In cases in which a treaty comes into effect after the exchange of documents of ratification, a signatory State, even if it has ratified the treaty, is not obligated to proceed with the exchange or deposit of the documents of ratification. In the Soviet view, a contracting party is entitled to make reservations to a multilateral treaty during the entire period from signature to actual ratification (or exchange of ratification documents, when the coming into force of the treaty depends upon the completion of this procedure).¹

Refusal to ratify a treaty, without any unfavourable consequences whatsoever, is a principle 'fully recognised by the Soviet science of international law'.² As early as 1926 Korovin stated that 'refusal to ratify is entirely legal, and may not be regarded as an unfriendly act'.³ However, added Durdenevski, 'repudiation of a *ratified* treaty, without extremely weighty circumstance to justify such repudiation (for example, revolution in a state), is at best an international *cause célèbre*, and may easily be followed by reprisals'.⁴ 'Needless to say', writes Polents, 'the Soviet state does not ratify international treaties signed by it only in those cases when there are weighty reasons for [non-ratification] and when the treacherous policy of the other party to the treaty—a capitalist power—makes ratification impossible'.⁵ Two examples, cited by Soviet authors, may be given of Soviet failure to ratify. On 8 June 1922 the Soviet Government refused to ratify a provisional commercial agreement with Italy of 24 May 1922 on the grounds that it contained no explicit recognition of the Soviet Government and that it was too advantageous to Italy.⁶ In 1923, the Soviet Government, claiming that the Lausanne Straits Convention of 24 July 1923 'violated the sovereign rights of Turkey and was clearly directed against the Soviet Union', refused to ratify it.⁷

Refusal by the Soviet Government to ratify a treaty, therefore, is represented as a legal act which must not be interpreted by other States as a hostile gesture. When other countries refuse to ratify a treaty, however, such refusal receives, in Soviet doctrine, far less absolute dispensation.

¹ Polents, *op. cit.*, pp. 26–27.

² *Ibid.*, p. 24.

³ Korovin, *op. cit.*, p. 94. Cf. Kozhevnikov's opinion that 'the refusal to ratify does not in itself constitute an illegal act'. *Mezhdunarodnoe Pravo* (1947), p. 381.

⁴ Durdenevski, *loc. cit.*, p. 21 (italics added).

⁵ Polents, *op. cit.*, p. 24.

⁶ Korovin, *op. cit.*, p. 94; A. S. Korolenko, *Torgovye Dogovory i Soglasheniia SSSR s Inostrannymi Gosudarstvami* (Trade Treaties and Agreements of the U.S.S.R. with Foreign States), Moscow, 1953, p. 28.

⁷ Polents, *op. cit.*, p. 24, citing F. I. Kozhevnikov, *Sovetskoe Gosudarstvo i Mezhdunarodnoe Pravo* (Moscow, 1948), p. 229.

Conclusion of treaties 'without any intention to ratify them' is a practice 'frequently used by capitalist states'. 'The ruling classes in capitalist countries often make use of "tricks of acrobatics" [which may range] up to the change of cabinet in order to disrupt signed international treaties.'¹ As examples of 'capitalist non-ratification policy', Soviet writers point to the Soviet-British trade treaty of 8 August 1924 which the 'conservative cabinet of Baldwin-Chamberlain' refused to ratify,² and the non-ratification by 'Marshallised Belgium' of a Soviet-Belgian trade treaty in 1948.³ Another example of non-Soviet non-ratification, which has been used effectively for Soviet propaganda, concerns the Protocol on the Prohibition of the Use of Suffocating, Poisonous and Other Similar Gases and Bacteriological Means of Warfare of 17 June 1925, which the United States has not ratified.⁴

VI

Soviet theory does not view an international treaty which is subject to ratification as having any legal force until (a) the ratification process has been completed, or (b) completion of the exchange or deposit of the documents of ratification depending upon the stipulation concerning ratification in the treaty text.⁵ Then, however, the ratification or exchange of acts of ratification is considered as validating the treaty from the moment of signature, and has thus a *retroactive* effect.⁶ In consequence, no changes may be introduced in the interval between signature and ratification of a bilateral treaty.⁷

¹ Polents, op. cit., p. 24. Polents notes, however, that both the League of Nations and the Pan-American Union emphasized the full and unlimited freedom of refusal to ratify.

² Ibid., p. 25.

³ Kozhevnikov in Korovin, ed., *Mezhdunarodnoe Pravo* (1951), p. 406.

⁴ 'The stubborn refusal of a few capitalist states, for example, the U.S.A.' to ratify this protocol, according to Kozhevnikov, 'is justly regarded by the entire progressive world opinion as evidence of the aggressive intentions on the part of the leading circles of those states, inasmuch as the protocol is an expression of the legal conscience of all progressive mankind.' Kozhevnikov, 'Nekotorye Voprosy Teorii i Praktiki Mezhdunarodnogo Dogovora' (Some Questions of Theory and Practice of the International Treaty), *Sovetskoe Gosudarstvo i Pravo*, 2 (1954), pp. 70-71.

⁵ Polents, op. cit. Soviet doctrine is thus in agreement with the prevalent traditional international treaty practice.

⁶ Kozhevnikov, *Mezhdunarodnoe Pravo* (1947), pp. 379-80. This is also the point of view taken by American jurisprudence: Moore, in *Digest*, vol. v, p. 244, states that 'A treaty is binding on the contracting parties, unless otherwise provided, from the date of its signature, the exchange of ratifications having, in such case, a retroactive effect, confirming the treaty from that date.' The Harvard Research in International Law, 'Draft Convention on the Law of Treaties', Supplement, *American Journal of International Law*, 29 (1935), pp. 799, 811, is therefore not entirely accurate in stating that 'Apart from express stipulation in treaties themselves providing for it, the rule that treaties which came into force subsequently to the date of signature operate retroactively as to the date of signature, has no support to-day among writers on international law outside the United States.' See also Briggs, ed., *The Law of Nations: Cases, Documents and Notes* (2nd ed., London, 1953), pp. 865-6.

⁷ Polents, op. cit.; Kozhevnikov in Korovin, ed., *Mezhdunarodnoe Pravo* (1951), p. 380.

Soviet documents of ratification, according to the Soviet view, 'reflect the general style of Soviet diplomacy' and consequently are characterized by their 'brevity, clarity, simplicity and exactness of formulation'. They are issued by the ratifying constitutional organ, namely, the Presidium of the Supreme Soviet. Without them, there is no ratification; Soviet practice and theory have never accepted either oral ratification or ratification through fulfilment. 'The declarations of bourgeois authors about the existence of ratification of this kind are unsubstantiated assertions. . . .'¹ The exchange or deposit of ratification documents between the parties is viewed in Soviet jurisprudence as essential for the entry into force of the treaty, since the contracting parties thus certify before each other the fact of ratification.² Many Soviet treaties subject to ratification have nevertheless come into force upon signature, when the parties so agreed.³ In some cases, moreover, certain parts of clauses of a treaty have come into force upon signature, while the rest of the treaty required ratification to make it come into force.⁴ And sometimes a treaty has come into effect temporarily before the exchange of acts of ratification.⁵

Soviet doctrine does not stipulate any particular length of time in which ratification or the exchange of acts of ratification must be performed; it leaves this problem wholly to the agreement of the contracting parties. Consequently, in cases in which the length of time between the signature and ratification is not stipulated, the parties may themselves decide to exchange documents of ratification as soon as possible, within a certain time limit, or after a certain condition has been fulfilled.⁶

¹ Polents, *op. cit.*, p. 24. According to Polents, *ibid.*, Soviet documents of ratification normally consist of the introduction which mentions the ratifying organ and gives the title, place and date of conclusion of the treaty to be ratified; the full text or texts of the agreement or agreements to be ratified, with any reservations and appendices; and the conclusion, a declaration that the given agreement or agreements have been approved and will be observed fully and without deviation. Appended is the signature of the Chairman of the Presidium of the Supreme Soviet of the U.S.S.R., usually the counter-signature of the Minister of Foreign Affairs, and the seal of the Presidium of the Supreme Soviet.

² See, for example, Article 8 of the British-Soviet Treaty of Alliance of 26 May 1942.

³ Examples are the Customs Convention with Italy of 6 May 1933; the Treaty of Commerce and Navigation with Czechoslovakia of 25 March 1935; the Agreement of 6 January 1936 regarding the Extension of the Provisional Trade Agreement of 12 January 1934, with France; the Peace Treaty with Finland of 12 March 1940; and the Treaty of Friendship, Mutual Aid and Postwar Collaboration with Czechoslovakia of 12 December 1943.

⁴ For example, certain paragraphs of the Treaty of Friendship between the Armenian, Azerbaidzhan and Georgian Soviet Socialist Republics, on the one hand, and Turkey, on the other, of 13 October 1921, and the Treaty of Rapallo between the R.S.F.S.R. and Germany of 16 April 1922.

⁵ Article 7 of the Customs Convention with Italy of 6 May 1933, for example, provides that the convention may be put into force provisionally by means of an exchange of notes.

⁶ For example, the Soviet-Finnish Treaty of Non-aggression and Peaceful Settlement of Disputes of 21 January 1932 did not stipulate the length of time in which the documents of ratification were to be exchanged, but a protocol of signature provided that ratification was to be carried out 'in the shortest possible time' and the exchange of acts of ratification within thirty days thereafter.

VII

The possibility of reservations being made by a State before ratification is considered by Soviet authors chiefly with reference to the ratification of multilateral conventions. Polents maintains that in multilateral treaties, which come into effect after the exchange or deposit of the ratification documents, the contracting parties should be permitted to enter their reservations concerning 'the limitations on the action of separate regulations of the treaty in relation to the given state or to some part of its possessions'.¹ And he added:

'For the Soviet Union the possibility of making reservations is of extremely great significance. The Soviet Union will make use of reservations for the defence of interests of socialist states with the aim of safeguarding those progressive principles for which it is struggling.'²

Krylov agreed completely:

'Universal regulations on treaty reservations are particularly important for our socialist state. The fact is that the U.S.S.R., entering into a collective treaty, is often forced to state reservations because many treaties, prepared by bourgeois states, cannot be fully acceptable to the U.S.S.R. When the U.S.S.R. signs a bilateral treaty it often accompanies the agreement with a unilateral declaration—a reservation. . . . In multilateral treaties reservations are all the more indispensable and it becomes necessary for the U.S.S.R. to make use of them.'³

The use of reservations by capitalist States is, however, regarded in a very different light. They are said by Soviet writers to use reservations in order to 'reduce to nothing the promising, solemn declarations of peaceful intentions, or of equality of the parties contained in signed international agreements and conceal the race for armaments, or limit the sovereign rights of a weak state for the benefit of a strong one'.⁴

Reservations, according to Soviet doctrine, cannot be of a unilateral nature; a reservation represents in itself a new offer and necessarily involves a change in the treaty obligations or in their scope. Consequently, reservations made during ratification must be made known to all the contracting parties, who may accept such reservations either by an open declaration or by performing acts which presume their assent to the reservation; ratifica-

¹ Polents, op. cit., p. 26. Thus, for example, during the ratification of the Protocol on the Prohibition of Suffocating, Poisonous and Other Similar Gases and Bacteriological Means of Warfare, the Soviet Union made a reservation (1) 'that the designated Protocol obligates the Government of the U.S.S.R. only with respect to states which have signed and ratified it or have definitely affiliated themselves with it', and (2) 'that the designated Protocol ceases to be binding for the Government of the U.S.S.R. with respect to any hostile state, the armed forces of which, as well as the formal or factual allies of which, shall not respect the prohibition which forms the subject of this Protocol'.

² Polents, op. cit.

³ Durdenevski and Krylov, *Mezhdunarodnoe Pravo* (1946), p. 21; cited by Polents, *ibid*.

⁴ Polents, op. cit., p. 27.

tion by other contracting parties of a treaty to which reservations have been made constitutes such tacit consent.¹ At the same time, however, Soviet theory admits the possibility of the contracting parties to a multilateral treaty reaching an agreement on the *inadmissibility* of any reservations.

Conclusion

Comparing the Soviet theory, practice and policy of treaty ratification with that of the non-Soviet world, several observations may be made:

(1) In spite of the arguments of later Soviet scholars, Korovin's evaluation—the first considered statement on ratification in Soviet Russia—is still true: for the Soviet Union treaty ratification has always been a matter of technique rather than of principle. Today, just as thirty years ago, the Soviet Government 'prefers to assemble all powers in the simple hierarchy of Soviets'. It still does not believe in the principle of separation of powers by a system of checks and balances, which it views as 'a form of somewhat illicit control exercised by public opinion over the secret workings of national diplomacy'. Today, as before, ratification is not expected to secure democratic control for the more important foreign affairs but is 'solely a technical function of the [Soviet] government'.² With or without constitutional provisions, with or without special laws of ratification, the nature of ratification has remained essentially what it was at the outset: a useful governmental and state technique, a convenient means of formal checking on treaty negotiations and negotiators. Or as Lisovski put it in 1955, almost thirty years after Korovin's much-criticized book appeared, 'ratification by the head of a state of international treaties signed by representatives makes it possible to control better the activity of his representatives'. At the same time, ratification facilitates proper governmental control 'over the activity of the Ministry of Foreign Affairs and its organs. Consequently, ratification is indispensable at the present time'.³

(2) At the outset, ratification was employed by the Soviet Government for several reasons, which we have already considered: first, the dominating reason was the internal emergency of the Soviet State and later ratification became a matter of expediency and prestige. The chief reason, however, for the employment of the institution of ratification, and for its constitutional and legislative flourishing, was simple *reciprocity*. As Korovin

¹ For the Soviet view concerning a case decided by the International Court of Justice *re* permissibility of reservations to the Genocide Convention, see S. Borisov, 'Suverennoe Pravo Gosudarstv-uchastnikov Mnogostoronnikh Dogovorov Zaiavliat' Ogovorki' (The Sovereign Right of Participant States in Multilateral Treaties to Declare Reservations), *Sovetskoe Gosudarstvo i Pravo*, 4 (1952), pp. 64–69. See also Durdenevski, 'K Voprosu ob Ogovorkakh v Mezhdunarodnykh Dogovorakh' (On the Question of Reservations in International Treaties), *ibid.* 4 (1956), pp. 97–100.

² All citations are from Korovin, 'Soviet Treaties and International Law', *American Journal of International Law*, 22 (1928), p. 754.

³ Lisovski, *op. cit.*, p. 241.

originally argued, ratification was, and is today, 'a technical function of the government *generally employed for reasons of international reciprocity*'.¹ No matter how unique ideologically, no matter how different as a system, no matter how drastic the changes it brought about, the Soviet Government has ruled a population on a definite territory and, *nolens volens*, became one State among many. To survive at first and to grow later, the Soviet State had to accept certain traditional measures dictated by its sheer existence and by its relations, whatever their nature, with other States. Ratification of treaties was, and still is, one of these measures; co-existence with other nations, however it may be interpreted by Soviet leaders in the changing context of Soviet domestic and international relations, inevitably entails the ratification of international treaties.

(3) With the increasing stability of the Soviet State both at home and abroad, ratification was separated from its primitive—and extraconstitutional—beginnings and became a sophisticated constitutional institution. For all practical purposes, however, it has not substantially differed in the later stages from the Western pattern. Soviet authors even admit that in form and procedure, Soviet ratification was copied from Western models.

Certain peculiarities characteristic of Soviet ratification did, however, emerge: (a) Formally, under the amended 1938 federal law, Soviet ratification is a rather narrow concept limited to only three categories of treaties—those of peace, of non-aggression and mutual assistance against aggression, and those which the contracting parties agree to make subject to ratification. In fact, however, Soviet practice has been fairly broad and liberal with respect to the ratification of treaties. (b) The institution of *confirmation* of international treaties has been quite flexible, in law as well as in fact, and has served as a useful and effective substitute for ratification. Confirmation of international treaties has played very much the same part under the Soviet system. (c) The role of the Council of Ministers—'the Government'—has grown consistently, both because of the Soviet appreciation of confirmation as a more efficient device than ratification (a function of the Soviet 'State') and because of the institution of 'preliminary examination' of all Soviet treaties, which has been entirely within the jurisdiction of the Council. Before the conclusion of a treaty it is the Council which determines whether it should be ratified under the reciprocity clause, confirmed, or merely signed. And the confirming itself is done again solely by the Council. (d) Under the 1944 constitutional amendment, treaties with foreign States may also be concluded and ratified by the Union Republics; in turn, such treaties calling for ratification are ratified by the Presidia of the Supreme Soviets of the Union Republics. Up to October 1956, of some thirty-six treaties signed by the Union Republics, twenty-two were ratified

¹ Korovin, *op. cit.* (italics added).

and one confirmed. The Ukrainian S.S.R. has ratified twenty, the Belorussian S.S.R. nineteen; no other Union Republic is known to us to have engaged in treaty ratification. All the treaties ratified by the two Union Republics have been multilateral functional agreements of only slight political importance.¹

(4) Soviet legal doctrine, accepting the inevitability of ratification as a permanent feature of treaty-making, has attempted to embellish upon it and interpret it, as did Pashukanis and after him Plotkin, Krylov, Kozhevnikov and other lesser lights, as 'an act of foreign policy around which a complicated struggle is usually under way',² as a weapon in the Soviet arsenal for both policy and propaganda purposes. It cannot be said that they have succeeded. Ratification has never become an important factor in the Soviet practice of treaty-making, at home or abroad.³ In terms of publicity, it cannot compete with the formal conclusion of a major treaty. In terms of policy, even the 1938 law, with its highly publicized stress on security and high political treaties, has had quite limited policy results.

Lacking any real basis for interpreting the institution of ratification in political terms, Soviet authors have attempted to stress the 'democratic, representative and solid' quality of Soviet ratification and to contrast it with the 'undemocratic, unrepresentative and unreliable' ratification of the 'capitalist states'. In practice, however, this has amounted simply to the tautological and highly debatable proposition that Soviet foreign policy is by definition peace-loving and progressive, and that ratification by the Soviet Government of treaties concluded in accordance with that policy has the same characteristics, whereas the opposite is said to be in all respects true of those states whose policies are unacceptable to the Soviet Union.

¹ Ratification of the U.N. Charter by the Ukrainian and Belorussian S.S.R.s and of three I.L.O. conventions by the Ukrainian S.S.R. has already been mentioned (above, p. 325, n. 5). Other multilateral conventions ratified by one or both of these Republics include the Protocol Amending Agreements, Conventions and Protocols Concerning Narcotics of 11 December 1946; the Universal Postal Convention of 5 July 1947; the International Telecommunications Convention of 2 October 1947; the International Convention for the Suppression of the Traffic in Women of Full Age of 12 November 1947; the Convention Concerning the Régime of Navigation on the Danube of 18 August 1948; the European Convention on Radio Broadcasting of 15 September 1948; the Geneva Conventions of 12 August 1949; the Convention on the Prevention and Punishment of Genocide of 9 December 1948; the Universal Postal Convention of 11 July 1952; the International Telecommunications Convention of 22 December 1952; the Convention on the Political Rights of Women of 31 March 1953; the Constitution of U.N.E.S.C.O. of 16 November 1945 ('accepted' by the B.S.S.R. and the Ukrainian S.S.R. on 12 May 1954); the Convention on the Protection of Cultural Treasures in Case of Armed Conflict of 14 May 1954; the Supplementary Convention on the Abolition of Slavery of 7 September 1956; and the Charter of the International Agency on Atomic Energy of 26 October 1956.

² Ye. B. Pashukanis, *Ocherki po Mezhdunarodnomu Pravu* (Essays in International Law) (Moscow, 1935), p. 158.

³ It should, however, be pointed out that the formal ratification and denunciation by the Supreme Soviet of major treaties (for example, the twenty-year Treaty of Alliance with Great Britain of 26 May 1942) is no doubt intended to serve an educational and propaganda function within the Soviet Union.

THE PROGRESS OF INTERNATIONAL LAW¹

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DR. WHEWELL, Master of Trinity College, Cambridge, died in 1867, leaving in his will a provision for a Professor and certain scholars in international law. The chair was filled for the first time in 1869 by the election of Sir William Vernon Harcourt, already well known for his letters to *The Times*, under the pseudonym of 'Historicus', on topical issues involving international law. Whewell's benefaction was timely, for international law, as we can now see, was then about to enter upon what may prove to have been its most important as well as its most critical phase of change and development. It may be instructive, therefore, on this occasion, to look back upon the span of ninety years of the Whewell chair, to trace the principal changes in the law which have come about during this time, and to attempt to assess what progress has been made. But first it will be necessary to glance farther back, in order to understand the system that Vernon Harcourt taught in the 1870's.

I

The modern State system, as it emerged from the Renaissance and Reformation, had presented in the late sixteenth and early seventeenth centuries a new political problem: a problem which was explained according to two differing principles, namely, the principle of State sovereignty and the principle of international law. The one explained the State in isolation, the other explained the State in a society of States. These two differing notions of statehood can be, and have been, apparently reconciled by a variety of dialectic devices. But the truth of the matter is that, fundamentally, they are opposed principles; and the history of international law is essentially the story of a struggle between the idea of a legally ordered society of States, on the one hand, and, on the other, the idea of a mere juxtaposition of sovereign States each one ultimately legally autonomous.

Grotius in his *De Jure Belli ac Pacis* had enunciated a system in which the totality of international relations were to be subjected to the rule of law.² But in the two succeeding centuries this ideal, as it gradually approximated more nearly to actual practice, had suffered a decline; for international law by the eighteenth century had already learned to speak the

¹ The basis of an inaugural lecture delivered on 20 January 1958.

² Sir Hersch Lauterpacht in this *Year Book*, 23 (1946), at p. 19.

language of State sovereignty. And, indeed, this tendency was sanctioned by contemporary ideas of the law of nature, for the personified State was conceived as enjoying the equivalent of the natural rights of man, and the chief task of international law, therefore, to protect those rights. Thus it came about that the international law textbooks of the early nineteenth century were much concerned with the definition of the sovereign State as the sole subject of international law, and with what were called the fundamental or primordial rights of the State. These rights were conceived in large, political terms: independence, equality, respect, self-preservation. The few unmistakably legal rules, such as those governing the privileges and immunities of sovereigns and of their ambassadors, concerned only the formal and external contacts of States. The issues which made for war—immigration, economic and financial policy, armament—these were all matters which the law acknowledged as belonging to the 'reserved domain' of sovereign discretion. The 'reserved domain' included also the right to war; for the Grotian attempt to distinguish between just and unjust wars had long been abandoned. War was 'no illegality' whatever its purpose or motives and the law was content merely to attempt some mitigation of the mode of its conduct and to achieve a workable balance between the commercial interests of belligerent and neutral. A conqueror could not only impose a settlement by force but could also invoke the sanction of the law for it. There was no international organization: in this completely decentralized society, each separate State was free to decide for itself what the law was, and self-help was the law's only sanction. Indeed, it was a principle of international law, and for that matter still is, that no international tribunal may exercise jurisdiction over a State unless the State consents.¹ Harcourt's Whewell lectures were never published, but the Squire Law Library possesses a slim exercise book containing a shorthand note of Harcourt's lectures on international law given in 1871. The note was taken by William Courteney Kenny, afterwards Downing Professor. Sixteen lectures were sufficient for the laws of peace, war and neutrality, and the strictly legal material is throughout inextricably mingled with material which really belongs either to history or to international relations. Sir Henry Maine's twelve posthumously published Whewell lectures delivered in the Michaelmas Term, 1887,² give the same impression of international law as a small, peripheral subject, more nearly related to government, history and international relations than to law properly so called.

Whether or not this system was rightly called a system of 'law' is a terminological question which has attracted a good deal of attention but is

¹ *Eastern Carelia case, P.C.I.J. (1923), Series B, No. 5, at p. 27*: 'It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.'

² Maine, *International Law* (1915).

of no great importance. But law or not, it is necessary to emphasize the partial and inadequate nature of that system, because failure to realize this has given rise to the lay fallacy that the only trouble with international law is that it is not generally obeyed. Yet the fact of the matter is that, during the greater part of its history, the problem has not been one of securing obedience to such law as there was, but of bringing about its enlargement into a more adequate system. The late Professor Brierly put his finger on the truth of the matter when he said: 'the regular observance of the international law of peace is explained only too easily; it is generally observed largely because there is little temptation to violate it, because its yoke lies easily—too easily—on the States.'¹

II

But by the 1860's a great forward movement in the development of international law was already under way. It was partly that interest had revived after the recent wars that had shattered the long peace after Waterloo; for wars have always stimulated interest in the subject. There was, however, a more abiding reason to be found in the effects of the Industrial Revolution on international relations. The improvements in communications, the expansion and increasing complexity of international trade and finance, the collision of interests between the leading industrial powers in their expansion into under-developed areas; all these factors were working towards a growing interdependence of States, which was to make a traditional international law built round the idea of the individuality of States, an increasingly inapt instrument.

Outward and visible signs of the beginnings of this new progress in international law were not far to seek. In the Declaration of Paris of 1856 the differing British and continental views of the rules of maritime warfare had been agreed in a code which was soon to be recognized universally. Jean Henry Dunant's eye-witness account of the field of Solferino had shocked governments into accepting the first Geneva convention in 1864. The first attempt at a diplomatic conference to agree to certain rules limiting methods of warfare on grounds of humanity was held at St. Petersburg in 1868. The *Alabama* arbitration of 1872 between this country and the United States—after a controversy in which Vernon Harcourt took a vigorous and honourable part—presented the unusual spectacle of a submission to neutral arbitrament of an issue which might easily have led to war.

In Great Britain itself new legislation bore witness to a retreat from legal isolationism. In 1870 the first British Nationality Act marked the first abandonment of the old common-law principle *nemo potest exuere patriam*,

¹ *The Basis of Obligation in International Law, and Other Papers* (1938), p. 54. This particular passage was written in 1928.

and the Foreign Enlistment Act of the same year was a great advance on the original Act of 1819.

About the same time there was an awakening of interest in the study of international law both in this country and throughout Europe. In 1869 there appeared the first legal periodical devoted to international law, the *Revue de droit international et de législation comparée*, with John Westlake, Q.C., Fellow of Trinity College, and later a Whewell Professor, as one of its joint editors. In September 1873 a select body of specialists met at Ghent to vote the first Statutes of the Institute of International Law, as an 'exclusively scientific association . . . to favour the progress of international law by seeking to become the organ of the legal conscience of the civilized world'. In October of the same year the more popular International Law Association was founded at Brussels.

III

What then have been the results of this progressive movement begun a hundred years ago? We can best see what ground has been lost or won if we move now to our present times and, looking back, try to gather the separate strands of development or regression.

In many ways the most striking as well as the most significant change which has occurred is in the range and content of the substantive international law; a development which may soberly be described as revolutionary.¹ It is not merely that the older branches of the law have been elaborated. The range of the law has been so greatly extended as to alter its very nature. It is no longer a law governing exclusively relationships between States, for it is no longer possible seriously to deny that for certain purposes both entities other than States² and individuals³ may be subjects of international law. It has been strengthened by entirely new branches of the law, as, for example, the law of international civil aviation or the law governing the resources of the Continental Shelf. It has pushed important salients even into the reserved domain of State sovereignty, as, for instance, in the rapidly developing customary and conventional law of human rights, which affects the State's treatment of its own subjects. The traditionally reserved domain of tariffs and of economic policy generally is invaded by a host of treaties, and a developing practice;⁴ it has invaded the question of nationality.⁵ This expansion of the law into new fields was assisted by the

¹ For an important account in detail of these changes see Jenks, in this *Year Book*, 31 (1954), p. 1; his article is also printed in Jenks, *The Common Law of Mankind* (1958).

² *Reparation for Injuries* case, *I.C.J. Reports*, 1949, p. 182.

³ See, for example, Sir Hersch Lauterpacht in the *Law Quarterly Review*, 63 (1947), p. 438, and 64 (1948), p. 97.

⁴ Schwarzenberger in the *International Law Quarterly*, 2 (1948), p. 402.

⁵ *Nottebohm* case, *I.C.J. Reports*, 1955, p. 4.

positivist theories popular in the late nineteenth and early twentieth centuries. In one way they seemed, by finding the basis of international law in the consent of States, to augment the significance of sovereignty. But on the other hand the temporary eclipse of law of nature theories meant the abandonment of those notions of the natural rights of States which for so long had caused international law to point in the wrong direction.

But the most important change undoubtedly is that the former gap in the system caused by the failure to control the right of war has disappeared. It has always been the historic mission and purpose of international law to control and eventually to abolish the evil of war. 'I trust', said Dr. Whewell, 'that all students and professors of international law will consider themselves as labouring on a problem which is still unsolved, while War exists; and in which all the approximate solutions must make wars more rare and more brief, as well as more orderly and more humane.' Until the First World War, effective reform was limited to the elaboration and codification of the traditional rules intended to make wars 'more orderly and more humane.' This, together with the questions of the laws of neutrality and prize law, was a principal task of the two Hague Peace Conferences of 1899 and 1907. But the First World War demonstrated—and the Second World War has emphasized—the hopelessness, in modern conditions of total, scientific warfare, of attempting to deal with the problem of war by legal rules limiting the use of weapons. So a more radical solution was attempted for the first time in the League of Nations Covenant, when certain kinds of war were made illegal. The system was strengthened by the Peace Pact of Paris of 1928, and is now completed by the provisions of the United Nations Charter limiting the lawful use of force in general. This change is of the greatest importance for the theory and practice of international law. For although the former anomalous position was sought to be rationalized by describing war as a sanction of the law, the truth is that, as the late Professor Brierly pointed out, 'to hold at one and the same time that States are bound to respect each other's independence and rights, and yet are free to attack each other at will, is a logical impossibility'.¹

Finally, it is not unimportant that in the course of all these changes, international law has become more recognizably lawyers' law. It is no longer a 'mere literary instrument', developed by writers commenting upon writers. Within the space of one generation it has become a 'case' law. In the earlier books, the few so-called cases cited were, as often as not, diplomatic incidents and wrangles that had never been determined by any tribunal. But the growing jurisprudence of international courts and tribunals, as well as the increasing extent to which municipal courts may be

¹ *The Outlook for International Law* (1944), p. 21.

faced with questions of international law has wrought a great change.¹ This growing technicality of international law is itself important because a developed and sophisticated legal régime frequently is much more cogent authority than the broad and ambivalent maxims of morality or of political wisdom found in the older books.

That this development of the law is the product of the actual practice of States, and is not merely the result of academic cerebration is shown by the circumstance that the pace of development has actually outrun the books; so that we find a recent writer suggesting that these developments 'have so transformed the character and context of the international legal system that it can no longer be satisfactorily presented within the framework of the classical exposition of international law'.²

This remarkable progress already accomplished in expanding the substantive law of nations may, however, give a dangerously misleading impression unless two other considerations are borne in mind. Firstly, it must be remembered that reservations of State sovereignty are not easily ousted, and wide political discretions may easily be preserved and even reintroduced under the disguise of what appear to be general rules of law. Secondly, the weakness of traditional international law was exhibited not only in the paucity and inadequacy of its substantive rules but even more in the almost total lack of those procedures of legislation, administration and judicial determination of disputes, that have always been the hall-mark of any developed system of municipal law.³ These two considerations are obviously closely related. Let us now, therefore, examine the position reached in the development of such international institutions. It will be convenient to look first at the place given to the judicial determination of disputes in international society; then at the procedures, such as there are, for legislation; and finally, the stage reached in the development of international organizations.

IV

It is not enough to have rules of law. If the law is to be effective there must also be courts to determine the application of the law to the circumstances of a particular dispute. The more sophisticated and developed the law, the more there will be need of such determination. Moreover, the jurisdiction of the court ought in a developed system to be obligatory, in the sense that one party to a dispute can take his adversary before the court

¹ The first, 1905, edition of volume i of Oppenheim's *International Law* cites 20 cases decided by tribunals or courts: the 8th edition of 1955 has 790.

² Jenks, loc. cit., p. 1.

³ In 1878, James Lorimer emphasized to his lecture class: 'The impossibility of conferring on international law the character of a positive system, otherwise than by the action of factors more or less closely corresponding to what, in municipal law, we call legislation, jurisdiction, and execution.' See *Studies National and International* (1890), p. 160.

whether he be willing or no. The attempts to achieve even a modest approximation to this position in international relations belong for the most part to the last hundred years, and it must be confessed that they have met with only modest success. For here there is a direct conflict between the needs of law and the demands of sovereignty; yet the traditional law had enshrined and sanctioned the fullest demand of sovereignty in the principle that all international jurisdiction is voluntary and may never be exercised over a State except with its consent.¹ It is unfortunate, that in the popular mind the chief weakness of international courts is thought to lie in their lack of effective enforcement procedures; for this obscures from view the fact that the true weakness, the lack of jurisdiction, is both prior to the question of enforcement and more fundamental. Courts even in relatively mature systems have often lacked effective means of enforcement and have not infrequently been defied by parties.² Moreover, in international law this has never been a serious problem: of the several hundreds of Awards or Judgments made in the last century or so, the ones that have not been carried out can be numbered on the fingers of one hand. But the lack of jurisdiction is not merely a weakness, it is a *conditio sine qua non*.

Voluntary arbitration as a method for the pacific settlement of disputes was given a tremendous fillip by the success of the *Alabama* claims arbitration in 1872, and it was then that the movement began which eventually achieved the establishment of the Permanent Court of Arbitration in 1899, and the International Court in 1920. But efforts to bring about a measure of compulsory jurisdiction have throughout availed little and for the most part, governments have insisted on reserving their sovereign discretion. In the earlier general arbitration treaties this was done more or less frankly by the reservation of 'matters of honour', or 'vital interests', or questions affecting 'independence'—all of them political phrases of uncertain content, but effectively protecting the right to decide subjectively about each case as it arose. The well-meant attempts of international lawyers to make possible a measure of compulsory jurisdiction by isolating so-called 'justiciable' or 'legal' disputes did no more than enable governments to make subjectively determined reservations of disputes under the cloak of technical and legal-sounding formulae, whilst at the same time obscuring the important truth that a legal answer can in fact be given to any dispute. It

¹ *Eastern Carelia* case, P.C.I.J. 1923, Series B, No. 5.

² E.g. Pollock in *Columbia Law Review*, 2 (1902), p. 512: 'in the early history of all jurisdictions the executive power at the disposal of the courts has been rudimentary, if indeed they had such power at all. It is not invariably true that even the highest courts in the most civilized States can always enforce their judgments. Thirty years before the American Civil War the State of Georgia defied the Supreme Court of the United States for eighteen months, with the open connivance of the President of the United States: "John Marshall has made the decision, now let him enforce it". But the decision made by John Marshall stands as part of the law of the United States and would do so even if its execution had been wholly frustrated in the particular case.'

created the situation in which the cynical maxim *de maximis non curat praetor* seemed apposite.¹

With the establishment of the International Court it was, of course, hoped that the provision of the so-called Optional Clause of the Court's Statute, enabling members to make declarations accepting compulsory jurisdiction in respect of States accepting a similar obligation, would gradually result in the spread of acceptances until a considerable area of compulsory jurisdiction had been established. But the plan was again largely frustrated by the ingenuity of foreign offices in devising more or less comprehensive reservations to their acceptances.²

The wheel came full circle in 1946 when the United States accepted, for the first time, the compulsory jurisdiction under the Optional Clause, but reserved, *inter alia*, 'matters essentially within the domestic jurisdiction of the United States of America as determined by the United States of America': a form of reservation enabling the party to withdraw the case by a subjective decision after the case has arisen.³ This form of 'automatic' reservation may well be contrary to the Statute of the Court and render void the whole acceptance containing it.⁴ But whether it is void or valid, the practical result is the same; if invoked it leaves the Court without jurisdiction in the case. This reservation is clearly much the same in practical effect as the earlier reservations of 'matters of honour', 'vital interests' and the like. Thus, sovereignty, like the chameleon, can assume many disguises, and the reservation of sovereign discretions can readily be secreted in an acceptance of the compulsory jurisdiction of the Court. It is the more pleasing to be able to record that the British variant of the automatic reservation entered in 1957 has recently been withdrawn;⁵ and that there are indications of second thoughts in the United States also.⁶ The 'automatic' reservation is, however, only one of many reservations by which the jurisdiction of the Court has, especially since the war, been curtailed.

The erosion of sovereignty in this all-important aspect of international law is therefore a process of painful gradualness. It would be quite wrong, however, to suppose that little has been achieved since the days of the

¹ Lauterpacht, *Function of Law in the International Community* (1933), *passim*.

² On this whole question see Waldock in this *Year Book*, 32 (1955-6), p. 244.

³ The effect has arisen before the Court in the *Interhandel* case now being argued.

⁴ See Judge Sir Hersch Lauterpacht's separate Opinion in the *Norwegian Loans* case, *I.C.J. Reports*, 1957, p. 34.

⁵ The declaration of 18 April 1957 reserved *inter alia* questions 'which, in the opinion of the Government of the United Kingdom, affect the national security of the United Kingdom or of any of its dependent territories'. See Cmnd. 249. By the declaration of 26 November 1958 this reservation was withdrawn subject, however, to a substantial proviso intended to prevent retro-active effect of the withdrawal, and so excluding proceedings over events occurring previous to 26 November 1958. See Cmnd. 599.

⁶ See, for example, an address by William P. Rogers, Attorney-General of the United States, reprinted in the *International and Comparative Law Quarterly*, 7 (1958), p. 758.

Alabama. The contribution made by the International Court in the development and consolidation of the law by its reported decisions is already very considerable. Also, it must be borne in mind that the disappointing results of the Optional Clause jurisdiction are in some measure offset by the advisory jurisdiction, which has proved to be far more important than was foreseen by its designers. But more significant is the consideration that the Court, despite its small area of effective compulsory jurisdiction, has in fact given judgment in a notable number of cases, some of them of great importance; and a court's authority and power grow with the actual exercise of its jurisdiction in hearing and determining cases.

V

In the long run there can be little hope of establishing general compulsory jurisdiction in international law unless there stands alongside it some machinery of legislation by which the law to be applied by the courts can both be made reasonably certain and changed if need be to meet a changed situation. Before the middle of the last century this need for devising procedures for changing and developing the substantive law of nations tended to be obscured; for a law ostensibly stemming from the twin sources of the law of nature and the *ratio scripta* of the *jus gentium* could not readily be admitted to be susceptible of reform; and in any case a law which regulated little more than the external and formal contacts of States had little need of change. Naturally, there were at all periods great and often violent changes in the relationships of States; but these took place, whether by dynastic marriages, diplomatic manœuvre or successful war, in that large area which the law reserved to the sovereign discretion. Of course, if a change or a settlement were embodied in a treaty, the binding force of the treaty itself was indeed sanctioned by the law; but always with the proviso that the treaty could be both validly imposed and terminated by the successful deployment of armed force.

Treaties in this early period were almost always political in content and purpose; but in the nineteenth century there appeared a new kind of treaty, the so-called law-making treaty, where, in the words of Sir Frederick Pollock, 'an agreement is made not between two or three States as a matter of private business between themselves, but by a considerable proportion, in number and power, of civilized States at large, for the regulation of matters of general and permanent interest'.¹ It probably made its first appearance in the Treaty of Vienna of 1815,² but it was from the 1860's onward that this vehicle was increasingly used to bring about the transformation in the nature and range of international law that we have just noticed.

¹ *Columbia Law Review*, 2 (1902), p. 512.

² In the provisions relating to the régime of international rivers, and to the slave trade.

Today, of course, the law-making treaty is by far the most important source of general international obligation,¹ and the term 'international legislation', which has been freely applied to this process of law-making by treaty, is doubtless justified both by the analogy to the legislative processes of domestic law and by the importance and volume of its achievements.² Nevertheless, the convenience and propriety of applying this description by analogy ought not to be allowed to obscure the important fact that the international community is still entirely lacking a legislature properly so called. The treaty is still contractual in form and therefore, with few exceptions, limited to the area of actual agreement. The obligation is created by a voluntary exercise of the State sovereignty and cannot bind an unwilling State. This is obviously a serious limitation on the usefulness of the law-making treaty: especially in those fields—e.g. in some economic matters such as fishery conservation, or some types of international labour convention—where regulation is pointless or unjust unless accepted by all interested States.

In some ways, indeed, this particular limitation on the usefulness of the law-making treaty is a less tractable problem today than it was during the later nineteenth century, when the tradition of the European concert still lingered, and it was possible to say that, 'as among men, so among nations, the opinions and usage of the leading members in a community tend to form an authoritative example for the whole'.³ Today, with our more numerous international community the example of the leading powers has lost some of its old authority; though it is still true that 'legislation' limited even to a comparatively small circle of States may on occasion carry great weight as a compelling indication of the direction of the future development of general law.

But whilst the rule of sovereignty is still, therefore, the starting-point of treaty law, so that the notion of 'international legislation' is to be accepted only with caution, it should also be remembered that procedures of majority rule have long been infiltrating through the medium of international organizations. Indeed, an authoritative commentator was able to say recently, 'the battle to substitute majority decision for the requirement

¹ See Hudson, *International Legislation*, vol. i, pp. xix-xxxvi for some figures. He calculates that in the period between 1864 and 1914 there were held over 100 international conferences or congresses, resulting in over 250 international instruments of various kinds. And during the 27 years from 1919 to 1946, over 700 multipartite instruments were concluded. In the same period, a total of 4,834 international instruments, multipartite and bipartite, were registered and published in the *League of Nations Treaty Series*.

² E.g. Moore in *Proceedings of the American Society of International Law*, 1907, p. 252: 'of all the achievements of the past 100 years, the thing that is most remarkable in the domain of international relations, has been the modification and improvement of international law by what may be called acts of international legislation.' See also Hudson's *International Legislation*, *passim*.

³ Pollock, *loc. cit.*

of unanimity in international organization has now been largely won'.¹ The tripartite nature of the International Labour Organization, as well as its procedure for the adoption of conventions without a signature stage, have also been valuable variations of the old orthodoxies of treaty-making procedure, even though individual State ratification is still required in the end.

Considering how rudimentary the machinery for international legislation nevertheless remains, it is remarkable how much has in fact been achieved. It must not be imagined, however, that the spate of new treaty law in the last hundred years has been brought about only as a result of the pressure of events and new needs of governments. A good deal is owed to the codification movement which has exerted steady pressure in the direction of the development of the law throughout this period. No doubt codification of international law is a much older idea;² but the general movement for codification first appeared in the 1870's when the learned societies already mentioned were founded for the scientific study of the law and of State practice with the specific end of codification in view.³

It would take too long to recall the many more or less successful attempts at codification of parts of the law which took place in the period up to 1914, among which The Hague Conferences of 1899 and 1907 were of outstanding importance; or the relatively disappointing results of The Hague Codification Conference of 1930. But after the Second World War an important advance was made when the General Assembly was charged in Article 13 of the Charter of the United Nations with the obligation 'to initiate studies and to make recommendations for the purpose of encouraging the progressive developments of international law and its codification', and the International Law Commission was established as the chief instrument for the carrying out of this obligation. This is not the place to attempt to describe the constitution and already voluminous work of that Commission; but some aspects of its experience are pertinent to the general problem of the legislative function in international law.

The Statute of the Commission assumes that a clear distinction can be maintained between codification of existing law, on the one hand, and the development of new law, on the other.⁴ The actual Reports of the Commission, however, show that the distinction has had to be considerably blurred in practice. This is hardly surprising, for the whole history of the

¹ Jenks, in this *Year Book*, 22 (1945), p. 34. See also Oppenheim's *International Law*, vol. 1 (8th ed., 1955), p. 278, n. 2.

² Bentham seems to have been the first to suggest an entire code of international law. See Oppenheim's *International Law*, vol. 1 (8th ed., 1955), p. 57 et seq., and the references there cited.

³ The Institute of International Law was, by Article 1, s. 3 of its Statutes, 'to give its aid to any serious attempt at gradual and progressive codification'. As for the International Law Association, its original title was the 'Association for the Reform and Codification of the Law of Nations'.

⁴ Article 15.

codification of international law shows that the difference between codification and development, if it exists at all, is one of degree rather than kind.¹ The question whether a written statement of a rule accurately represents existing custom or amounts to a modification of it, is always a matter on which there can be two opinions. And, indeed, in any instance where the existing rule were clear beyond all doubt, the codification of it were a work of supererogation.²

This impossibility in practice of distinguishing between arguments about what the law is and arguments about what it ought to be has the unavoidable consequence that the debates and hesitations of a body like the International Law Commission may seem to be doing actual harm rather than good by providing an opportunity of casting doubts even on some branches of the law which had hitherto seemed well settled. Whereas the function of the Code is to make the law more certain, the debates of the Commission have frequently seemed to have precisely the opposite effect.

This criticism is valid up to a point. It is, no doubt, true that the Commission may provide a platform and an opportunity, for those who find an existing rule of law inconvenient, to weaken that rule under cover of a scientific analysis of legal principles. On the other hand, it must also be remembered that in providing an opportunity for change and growth of the law, the Commission is in fact providing just those procedures of legislation of which the international community is so much in need, and which are implicit in the notion of the 'development' of the law referred to in Article 13 of the Charter. Furthermore, there is great value in a procedure by which the rival interests of States must be expressed in a scientific framework and made to speak the language of law.

Moreover, in so far as the Commission's debates and reports reveal different understandings on apparently clear rules of law, it should be borne in mind that the Commission may be doing no more than bring healthily into the open the true state of affairs. As Judge Sir Hersch Lauterpacht has said, 'once we approach at close quarters practically any branch of international law, we are driven, amidst some feeling of incredulity, to the conclusion that although there is as a rule a consensus of opinion on broad principles—even this may be an over-estimate in some cases—there is no semblance of agreement in relation to specific rules and problems'.³ It would indeed be surprising if it were otherwise in a legal system which has only recently acquired the rudiments of legislative processes; where the application of the law by courts is spasmodic and seldom compulsory; and

¹ On this point see also Sir Hersch Lauterpacht in *American Journal of International Law*, 49 (1955), p. 16, at p. 29.

² Cf. Lauterpacht, *ibid.*: 'unlike codification in other fields, codification of international law must be substantially legislative in character.'

³ *Ibid.*, p. 17.

where the principles accordingly have been employed more often as part of the vocabulary of diplomatic argument and negotiation, than for the direct resolution of specific issues.

It cannot reasonably be maintained, therefore, that the Commission does anything but good in revealing, and attempting to reach an agreed solution for, these weak spots in the law. It is true that the Commission's reports to the General Assembly, though in draft convention form, are not in any sense binding on anyone. Yet they do, according to their inherent merits, carry great authority. There has been, of course, one instance so far where, on the recommendation of the Commission, a diplomatic conference has been held to draft actual conventions: the Geneva Conference on the Laws of the Sea held in 1958. It is encouraging and perhaps significant that the conference was a considerable success. Four conventions of very great value and importance were adopted; and though of course they still await the necessarily slow process of ratification, they are already the starting-point for the discussion of the matters they cover. It was unfortunate, though probably inevitable, that the Press gave an impression of failure by concentrating on the one matter—the breadth of territorial waters—where the Conference failed to agree. But this failure was expected, for States were still jockeying for position on this question; and the failure to agree to a solution falls into perspective when it is remembered that here the Conference was not a court attempting to decide the application of existing law to a particular issue between defined parties, but a quasi-legislature trying to devise law for a new situation.

It is impossible to exaggerate the importance of developing these legislative or quasi-legislative procedures for the development of the law. On their success, moreover, depend also the prospects of persuading States to grant a larger measure of compulsory jurisdiction to the International Court of Justice; for it must be faced that the present uncertainty and immaturity of large areas of the law predispose governments to caution in accepting beforehand a judicial determination which may be law-making in an altogether larger sense than may be found in maturer systems.¹

VI

Closely connected with the problem of legislation is that of developing permanent organizations for administering the expanding substantive law. In the legally decentralized State community of the mid-nineteenth century, inter-State business was conducted through the orthodox diplomatic channels, and the law concerning diplomats took a correspondingly important place in the legal textbooks. An important qualification of this legally

¹ Cf., for example, the decision in the *Anglo-Norwegian Fisheries case*, *I.C.J. Reports*, 1951, p. 116.

decentralized society was, of course, to be found in the tradition of action through diplomatic conferences of the greater powers, inherited from the concert system. But this was on the political plane. There were no legally constituted organizations of a permanent character charged with the responsibility for the administration of the law relating to certain fields of activity. Again it was in the 1870's that these first began to appear. And again, it was in the field of expanding trade and communications, such as post, telegraph and railway, that the first international organizations were established. The pioneer international union set up to administer a treaty régime was the Universal Postal Union of 1874, by which frontiers were virtually abolished for the conveyance of mails. It were needless to recapitulate the story, which has often been told, of the several other technical unions, river commissions and the like which were established during the course of the century.¹ They were modest beginnings, but they were a great improvement on the temporary, makeshift conference secretariat, and though they did not touch questions of high policy they did deal with matters of real and growing significance in the day-to-day economic life of nations. Their relative obscurity is the mark of their efficiency.

Even before the First World War the propaganda movement had started which led eventually to the founding of the International Labour Organization in 1920, an organization which was revolutionary in two ways: first, in that its function was to concern itself with questions which hitherto had been clearly within the reserved sovereign domain of individual States; and secondly, in having direct representation from employers and labour as well as from governments. It is this latter feature which probably more than any other enabled it to survive into the post-1946 era, even though some of the economic premisses on which it was originally founded may well be obsolescent.

The period since the end of the Second World War has seen a remarkable proliferation of these international institutions bearing authority and responsibility in particular aspects of international and, indeed, domestic affairs.² They include such important bodies as the International Civil Aviation Organization, the International Bank, the International Monetary Fund, and the General Agreement on Tariffs and Trade, as well as some very powerful regional authorities like the Coal and Steel Community, the Common Market and Euratom, and the newly established European Court of Human Rights. Some of these have power to make decisions binding directly upon persons and enterprises within the member territories.

¹ See, for example, Zimmern, *The League of Nations and the Rule of Law, 1918-1935* (1939), ch. iv.

² According to a United States official publication (*International Organizations in which the United States Participates*), the United States by 1950 was a participant in over 200 international institutions and organizations.

It would be foolish to suppose that all these institutions are of equal value; moreover, even as in the internal affairs of States, it is by no means the case that international bodies and their staffs expand only in proportion to the useful work done. Nevertheless, by and large, these institutions exist because they fulfil a need that can only be served internationally. They are symptoms of the ever-growing importance and complexity of the interdependent aspects of the society of States. They bear witness to the extent to which, especially in quite recent years, international law and regulation have encroached upon what used to be regarded as purely domestic aspects of the day-to-day work and responsibilities of governments.

Furthermore, the existence of these institutions has resulted in the quite rapid development, especially since 1946, of an international constitutional law, dealing with their common problems: membership, voting and other procedures, the legal status of organizations, their relationships with their staffs, and so on. As the late Professor Brierly said, these organizations, 'though they cannot yet be regarded as giving a "constitution" to international society, may not unfairly be described as the beginning of its constitutional law'.¹

VII

But such institutions, however numerous and however important after their fashion, can never provide a government for international society. It remains, therefore, to consider the much more important attempts, no older than the last four decades, to found a general international organization of a political character, charged with the maintenance of peace. For, as Sir Hersch Lauterpacht has said, 'it is only under the shelter of and through such general organization endowed with overriding and coercive power for creating, ascertaining and enforcing the law that International Law can overcome its present imperfections'.² But although the requirements of the ideal organization of this kind can readily be appreciated, it is a very different matter to devise actual machinery by which the notions of separate sovereignties, entrenched in the law and in the minds of men for centuries, can be gradually ameliorated and the transition to even rudimentary international government achieved.

The League of Nations was at best only a tentative step towards a general political organization. Apart from the undertaking to refrain from certain, but by no means all, wars, it involved little or no abridgment of the sovereignty of its members. It sought rather to provide procedures by which,

¹ *Law of Nations* (5th ed., 1955), p. 92. For a profound and important study of these problems see Jenks, in this *Year Book*, 22 (1945), p. 11 et seq.

² See Lauterpacht in Oppenheim's *International Law*, vol. i (8th ed., 1955), p. 370. And see pp. 370-80 for a brilliant exposition of the basic principles of such an international organization.

it was hoped, those sovereign powers might be exercised co-operatively for the purposes of peace. But that hope was disappointed.

The United Nations was, in conception, very different. It was given large executive powers of enforcement action to be wielded by the Security Council with its majority of the greater powers, and the other Members agreed to accept and carry out their decisions. But the power of veto in effect neutralized these provisions, and the centre of gravity has inevitably shifted to the General Assembly; a body which, with its membership of eighty States comprising with few exceptions¹ all the nations of the world, is quite unprecedented in its near approximation to universality. Moreover, it is a body in which the newer States of the Afro-Asian group can wield considerable influence. It is true that the General Assembly has legal powers restricted in the main to discussion and recommendation; but that does not prevent it from wielding considerable political power, as has become apparent more than once in recent years.

The shift of political power to the General Assembly is interesting legally because it is a further shift away from the unanimity rule of sovereign equality, and towards majority government. This is a step forward, but it has dangers of its own. As the learned editor of Oppenheim says:

‘Whereas in the past one of the central problems of international organization was to overcome the hampering effects of the rule of unanimity, the no less urgent problem at the present day is to prevent majority decisions, arrived at without taking into account the legitimate interests of the minority or of the organization as a whole, from replacing negotiation in regard to questions which, in the first instance, only negotiation can settle in a satisfactory way.’²

But against this must be set the way in which successive Secretaries-General have developed their meagrely defined powers under Article 92 of the Charter, in successfully interposing the office of Secretary-General into the midst of orthodox diplomacy and negotiation.³ The presence in the diplomatic circle of a third, neutral influence, representing not particular State interests but the international interest, is a development that governments have naturally viewed with some suspicion. But it may well be one of the more hopeful signs of the times.

One of the most interesting aspects of the practice of the United Nations thus far has been the almost insignificant place the reservation of matters of domestic jurisdiction has had in actual practice, even though it is accorded the dignity of a general principle in the Charter itself. This formula, which has proved so powerful a bulwark of State sovereignty before courts, seems to be far less potent when deployed against a political body.

¹ The exceptions are Germany, Switzerland, Korea, Vietnam, Andorra, Liechtenstein, Monaco, and San Marino.

² Oppenheim's *International Law*, vol. i (8th ed., 1955), p. 378.

³ Schwebel, *The Secretary-General of the United Nations* (1952), *passim*.

The United Nations was imperfect in conception and even more disappointing in realization. But it must be remembered that any constitutional organization has a life of its own and is always capable of adaptation and development even whilst its paper constitution remains unchanged; as the above examples show. And in this there may be great hope for the future.

VIII

We have said that one of the ways in which the United Nations is significantly different from any previous international organization is that its membership of eighty States comprises, with a very few exceptions, all the States of the world. But this is not new merely for international organization; it is a new situation that there are so many States in the family of nations governed by international law. The position was very different in the mid-nineteenth century when the community of States governed by international law was a relatively small one, in which, moreover, the overwhelming predominance of power was concentrated in the older States of western Christendom. Thus, Dr. Jenks has recently said: 'Among the profound transformations which international law has experienced in the course of the last century none has been more significant or far-reaching than the transformation of the community within which the law operates from a family of nations based primarily on Western Christendom into a universal world community.'¹ This transformation requires a word of comment.

The predominance of European States in the relatively small world community of the last century, during what we have already seen was at the commencement of the most important formative era of international law, has not unnaturally aroused some suspicion amongst newly emerged nation States in the Americas, in Africa and in Asia; and has led them to ask whether they can reasonably be said to be bound in all respects by a law in the formation of which they had no part and which in fact is the characteristic product of what is to them an alien civilization.² Such doubts may derive apparent support from the somewhat insular statements to be found in the writers, particularly English, of an earlier generation. Thus Hall,

¹ *The Common Law of Mankind* (1958), p. 62.

² See, for example, M. Nervo of Mexico in the International Law Commission in its 1957 session on the responsibility of States (A/CN.4/106, p. 155):

'The vast majority of new states had taken no part in the creation of many institutions of international law which were consolidated and systematised in the nineteenth century. In the case of the law of the sea, for example, though the future needs and interests of newly-established small countries were not taken into account, at least the body of principles thus created was not directly inimical to them. With State responsibility, however, international rules were established, not merely without reference to small States but against them, and were based almost entirely on the unequal relations between great Powers and small States. Probably 95% of the international disputes involving State responsibility over the last century had been between a great industrial Power and a small, newly-established State. Such inequality of strength was reflected in inequality of rights, the vital principle of international law, *par in parem non habet imperio*, being completely disregarded.'

writing in 1880, says international law 'is a product of the special civilization of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognized by countries differently civilized'.¹ And even Westlake, writing a good deal later, says of the evidences of customary law that 'it is enough to show that the general consensus of opinion within the limits of European civilization is in favour of the rule'.² And other instances could be given.

Dr. Jenks regards this nineteenth-century 'concept of an exclusive family of nations' as an heretical deviation from the universalism of the founding fathers of international law, and urges the importance of a 'restoration' of the universalist approach.³ But the fact of the matter is, however we may interpret it, that the nineteenth century was the time when the family of nations was significantly enlarged. It must be remembered that 'universalism' came comparatively easily to the founding fathers, for their world was small; and however large their language, they had in mind for the most part the relations between the States of western Europe and those newer States overseas which by descent shared the same cultural tradition. In the second half of the nineteenth century, on the other hand, the question of the universality of the law was no longer academic. The expansion of western commerce into Africa, and into the middle and far eastern States raised in an urgent and practical form the question how far these new relationships were to be governed by international law. There appears to be little reason to suppose that in either State practice or in the main stream of the literature it was ever doubted that these relationships were so governed.

In so far as writers of the later nineteenth century may seem to be enunciating an exclusive view of the community of nations governed by law, certain considerations must be borne in mind, in attempting to understand their meaning. Firstly, in so far as they were stating that international law had its principal origins in the Christian civilization of western Europe they were, of course, stating an historical fact.⁴ Secondly, in so far as they assume the political predominance of these States in the international community they were again recognizing an obvious fact of their time. Thirdly, there were still at that time many territories, particularly in Africa, inhabited by primitive tribes whose customs were then but little understood,

¹ *International Law* (8th ed., 1924), p. 47.

² *International Law*, Pt. I, *Peace* (1904), p. 16.

³ See *The Common Law of Mankind* (1958), pp. 63-172, for an important and learned study of the problem of universalism.

⁴ This is not to suggest, of course, that there were not parallel developments of a most valuable kind in other cultures. See, for example, Namsaz in the *Indian Year Book of International Affairs*, 6 (1957), p. 172; and also the very full references in Jenks, op. cit. Nor is it to suggest that the western contribution is necessarily more valuable than those which other civilizations have made or will make in the future. It is merely that as a matter of historical fact, the system of law which has been generally adopted had its primary origin in western Europe in the fifteenth and early sixteenth centuries.

but which clearly did not constitute States in the sense of international law; and relations with these peoples, though doubtless governed by general principles of natural justice, could hardly be regarded as with 'civilized' States bound by the entire body of positive international law. There are, therefore, frequent references by nineteenth-century writers to the community of 'civilized' States; a qualification which still survives in the Statute of the International Court of Justice. No doubt some writers may occasionally have slipped into the error of thinking of 'civilized' as being the same as western or Christian, but this was certainly not its proper meaning. Westlake has explained that 'civilized' for this purpose was a term of art, and had 'nothing to do with the mental or moral characters which distinguish the civilized from the uncivilized individual'. The international test of civilization was simply government. Can a country furnish a government to which foreigners may look for protection?¹ 'In the answer to that question lies, for international law, the difference between civilization and the want of it. If even the natives could furnish such a government after the manner of Asiatic empires, that would be sufficient.'²

When allowance has been made for these considerations—all of which belong to the circumstances of the time—it will be found that there was never any real doubt that relations with the States of merely different culture and civilization must be governed by the whole system of positive international law. It is trite learning that by Article 7 of the Treaty of Paris, 1856, Turkey was to be 'admettre un participant aux avantages du droit public et du concert européen'. But Professor H. A. Smith has shown that this provision, whatever its political purport, cannot be understood to mean that Turkey was at that moment for the first time 'admitted' to the circle of States under international law, because 'for many centuries Turkey had maintained diplomatic intercourse and concluded treaties with Great Britain and other European Powers, and the official documents which accompany this intercourse make it clear that the general body of inter-

¹ *Collected Papers* (1914), p. 143. There was, of course, the system of capitulations; but Westlake at least did not regard this as in any way derogating from the qualification of statehood within the family of nations. See *ibid.*, p. 144, where he says: 'Those empires are formed of populations leading complex lives of their own, so far differing from that of Europe in important particulars, as in the family relations or in the criminal law and its administration, that it is necessary to allow to Europeans among them a system more or less separate under their consuls; but whatever may be the influence which the foreign powers derive from the force which they are known to possess though they do not habitually exercise it, it is the local force of the empire which on all ordinary occasions maintains order and protects each class of inhabitants in the enjoyment of the legal system allowed it.'

² For an interesting variation on the same theme, see Max Huber's Award in the *Island of Palmas* case (1928): 'Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.'

national law was considered to apply'.¹ The same was true of China and Japan, both of which were regarded by writers as members of the family of civilized States,² and Professor Smith's conclusion, after examining the documentary evidence of State practice of the period, is this:

Broadly speaking, the general conclusion which we may draw from the practice is that Great Britain has always regarded international law as the necessary consequence of orderly international intercourse. That is to say, if a State possesses a degree of civilization and stability sufficient to enable it to maintain normal relations with other States, then these relations will be regulated by the general body of international law. Whether the culture of such countries be Christian or non-Christian, European or Oriental, would appear to be irrelevant.³

It is important to notice that this opinion was apparently reciprocated by the countries concerned which, in this period, consciously adopted western international law as the law governing their new international contacts. So, when, in the mid-nineteenth century, China and Japan reversed their former isolationist policy and admitted contact with the west, they seem to have assumed from the beginning that those new relationships would be governed by international law. The study of international law as an academic discipline was introduced into Japan by students sent to the Netherlands who studied under Professor S. Vissering of Leyden, whose lectures were translated into Japanese and published in 1867. In 1864 Henry Wheaton's *Elements of International Law* was translated into Chinese under the auspices of the Imperial Government and translated into Japanese the following year.⁴ The Japanese Government in a declaration of 1867 stated that all matters of foreign intercourse should be conducted in accordance with the public law of the world; and indeed in adopting the solar calendar to replace the lunar calendar in 1872 it seems to have justified this reform on the ground that it was required by the public law of nations!⁵

Thus, it was in the nineteenth century that international law first spread to include States of widely differing customs and civilizations.⁶ It was the beginning of a system of law actually universal instead of notionally universal. The difference between then and the present day is not so much one of ideas as one of fact. The last fifty years have seen the emergence of

¹ Smith, *Great Britain and the Law of Nations* (1932), vol. i, p. 16.

² Thus, as early as 1840 we find Lord Palmerston complaining that certain doings of the Chinese Commissioner at Canton were 'in violation of the law of nations'; see Smith, *ibid.*

³ *Ibid.*, p. 18.

⁴ 'Already', says Dana in his American edition of 1866, 'this work has been quoted and relied upon by the Chinese Government, in its diplomatic correspondence with ministers of Western Powers resident at Peking.' See Carnegie ed., p. 19.

⁵ Shigeru Kuriyama in *The Japanese Annual of International Law*, 1 (1957), p. 1.

⁶ Moreover, those new members of the community were quickly taking part in the legislative processes of making new laws. The First Hague Conference of 1899 had a relatively narrow membership, but besides the European States there were present, U.S.A., Persia, Siam and Mexico. The second conference of 1907, however, besides the Latin American States whose dominant vote in the conference is well known, there were present, China, Japan, Persia, Siam and Turkey.

new national States in territories formerly 'uncivilized' in the technical sense. It is not that notions of universality have changed; it is just that the world contains far more States than it did,¹ and that they all rank as 'civilized'. Of course, the emergence of so many new States of widely differing cultures² into the family of nations will create tensions and difficulties. This has happened before, as when the new States of Latin America brought new vigour and new ideas to The Hague Conference of 1907. In the long run, the enlargement of the international community must both enrich international law and augment its relevance and authority.

IX

What conclusions, then, are we to draw from this retrospect of international law over three generations?

Perhaps the most important fact that emerges is how short a time it is since international law began the process of growing up into something approximating to a developed system. The traditional system, as we have seen, was a rudimentary and nearly static system, assuming a completely decentralized society. It was concerned almost entirely with the formal delimitation of areas of sovereign competence, and important matters were for the most part reserved to the domestic sphere of sovereignty. These included even the right of one State to use armed force against another.

A century ago, more or less, a more progressive movement of the law was already under way. Much new ground has been won for international law and the reserved domain of sovereignty has been significantly breached; though it was only after two disastrous wars had broken over the world, and still little more than a decade ago, that the first tentative efforts to control the right of war were extended to armed force generally, and the use of violence taken out of the sovereign domain and made a matter of international legal regulation. But a beginning has also been made upon the

¹ It is, of course, an important fact that the United Nations comprises a far greater *proportion* even of this greatly enlarged community than any previous general political organization did. Even so, it can never be said to be 'universal' in any strict sense until membership is not only comprehensive but also compulsory.

² It is, of course, tempting to find a bridge between different cultures by pointing to the common authority of the law of nature as the basis of international law. And indeed there is historical justification for this. Thus, we are told, the Yedo Government of Japan endeavoured to understand western international law through theories of natural law, in Confucianism (Kuriyama, loc. cit.). But there may be dangers if this is pressed too far, for there are differences between western and eastern ideas of the law of nature (see Needham, *Science and Civilization in China* (1956), vol. ii, pp. 518 et seq.). Moreover, such general principles will not really assist the practical solution of questions such as whether full compensation should be paid for nationalized property. It is true that the learning and ingenuity of comparative lawyers can discover striking similarities in the 'general principles' of widely differing systems (see Jenks, op. cit., for many examples). But it is probably also true that similar acuity deployed in the reverse direction would discover equally relevant divergences. The comparative method can do valuable service in enabling different systems to grow together in the future; it may be dangerous if used to obscure or minimize real existing differences.

problem of providing international society with procedures akin to legislation, for the adjudication of disputes according to law, and for the administration of the law. There is in existence a general political organization which, though most imperfect and inadequate, is yet a considerable advance on anything that has gone before. Amidst these new institutions the notion of sovereignty may still be found entrenched behind legal disguises and catch-words like 'domestic jurisdiction', or 'non-justiciable dispute'. Nevertheless, real and measurable progress has been made, and it is an encouraging sign that the progressive development of the law has steadily gathered momentum throughout the period we have examined.

This picture will disappoint cynic and sciolist alike; both these regard international law as a panacea, though the one thinks it an imagined one whereas the other believes it needs only to be 'applied'. International law can never be a panacea, for law is only one aspect of the immensely complex as well as immensely urgent problem that faces our civilization today. But international law is, if only one aspect, nevertheless an essential aspect.¹ It is obvious today that a community of rival sovereignties, which claim to be above the law or which, while professing submission to it, in fact refuse to recognize its supremacy, cannot escape self-destruction. The only mechanism by which a viable international society of States can be reached is through effective submission to a developing international law. This task has been well begun. Whether it can be completed in time is another question. But we may take encouragement from the real progress that has already been made. As Whewell himself said: 'The progress of the study of international law, . . . and the increase of a regard for the authority of such law, are among the most hopeful avenues to that noble ideal of the lovers of mankind, a Perpetual Peace—the most hopeful, because along this avenue we can already see a long historical progress, as well as a great moral aim'.

¹ ' . . . no political society can exist without law, and that law cannot exist except in a political society', Carr, *The Twenty Years Crisis* (1940), p. 227.

NOTES

THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

THE European Commission of Human Rights, at the invitation of the Council of Europe, attended a ceremonial session at Brussels on 3 September 1958 in celebration of Council of Europe Day at the Brussels Exhibition. It fell to the Editor of this *Year Book*, in his capacity as President of the Commission, to deliver a speech reviewing the operation of the European Convention for the Protection of Human Rights and Fundamental Freedoms up to date. As this general review of the working of the Convention may be of interest to readers of this *Year Book*, the text of the speech, slightly edited and omitting the opening and closing passages, is given below:

The Human Rights Convention signed at Rome was designed by the fifteen Member States to be the principal bulwark for safeguarding their common heritage of political traditions, of ideals, of freedom and of respect for the rule of law. The Convention is at once the highest achievement of the Council to date and a new landmark in the development of the status of the individual in international law. I propose to sketch for you a broad picture of the Convention as a European Bill of Rights—a Bill of Rights for free Europe. It is that aspect of the Convention which is supremely important.

The Statute of the Council of Europe set up no supranational organ and left a closer European unity to be won by further agreements between Member States. The Rome Convention was hailed as a great achievement precisely because it did set up special European organs of a supranational kind. But the very word 'Convention' serves as a warning that our Bill of Rights may have the features more of European international than of European constitutional law.

The Rome Convention was supplemented by a Protocol which added three further rights and freedoms and it is these two instruments together which form the European Bill of Rights.¹ They do not cover all the rights and freedoms mentioned in the United Nations Declaration of Human Rights. But, unlike the Declaration, they are hard, enforceable law. Very roughly speaking, the field covered by the two instruments is: the right to life; freedom from torture, inhuman or degrading treatment; freedom from slavery, servitude or forced labour; the right to liberty and security of person; the right, in case of arrest or detention, to be informed of the reasons, to be brought promptly before a judicial officer, to be tried within a reasonable time, to take proceedings to test the lawfulness of the detention; the right, in both civil and criminal matters, to the fair and proper administration of justice; freedom from retroactive criminal laws; the right to respect for private and family life, home and correspondence; the right to freedom of thought, conscience and religion; the right to freedom of expression; the right to freedom of peaceful assembly and association and to a trade union; the right of men and women of a marriageable age to marry and found a family; the right to the peaceful enjoyment of possessions; the right to education; the right to be governed by a freely elected legislature; and, finally, the right to have an effective remedy before a national authority for any violation of one of the protected rights or freedoms.

Such is the broad sweep of the rights and freedoms in the European Bill of Rights, and the Convention provides that they are to be enjoyed by everyone, without any discrimination on any ground. This rapid survey, however, does much less than justice to

¹ For the texts of the two instruments see *United Kingdom Treaty Series*, No. 71 (1953); Cmd. 8969.

those who drafted the Convention and the Protocol. These instruments provide a constitutional code of human rights capable of detailed application by both international and municipal tribunals. Each right and freedom is defined with some precision and at the same time the exceptions and restrictions to which, in the common interest, they must be subject in any civilized democracy are carefully formulated.

In some cases the exceptions and restrictions are quite specific. In others they are formulated by reference to what is necessary in a democratic society. For example, Article 8, which guarantees the right to respect for private and family life, states:

'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of the rights and freedom of others.'

A formula on similar lines is found in the Articles dealing with freedom of thought, conscience and religion, freedom of expression and freedom of peaceful assembly and association. You will appreciate how vital is the role entrusted to the Commission in regard to these freedoms which even more than the rights to liberty and to free elections are the guarantee of a democracy against authoritarian rule. In my opinion, the Commission has no more responsible task than this one of appreciating when restrictions upon those freedoms pass beyond what is legitimate in a free democracy.

My account of the Bill of Rights would be very incomplete if I did not refer to two further provisions. The first is Article 17, which says that nothing in the Convention is to be interpreted as implying for any State, group or person any right to engage in any activity aimed at the destruction or undue limitation of the rights and freedoms guaranteed in the Convention. The object of this Article was to prevent groups or individuals within a State from seeking to establish an authoritarian régime by gradually undermining the constitution under the shield of the freedoms guaranteed by the Convention. We have already had to apply this Article. The German Communist Party was indicted before the Federal Constitutional Court as an illegal organization under the German constitution. After a prolonged hearing, the Party was held to be illegal. The Communist Party complained to the Commission that their right to freedom of association had been violated. The liquidation of a political party is clearly a matter to be regarded with a very jealous eye. The Commission, however, having studied the proceedings before the Federal Court, held that the activity of the German Communist Party did fall within the special provision in Article 17, and that it was not therefore entitled to invoke the guarantee of freedom of association enshrined in the Convention.

The other provision is Article 15, which only comes into play 'in time of war or other public emergency threatening the life of the nation'. The Article then authorizes a government to take measures derogating from certain of its obligations under the Convention to the extent strictly required by the exigencies of the situation. A government taking such special measures is required to keep the Secretary-General fully informed of the measures and the reasons for them. The Article, as you can well understand, has been a central point in the case between Greece and the United Kingdom concerning measures taken in Cyprus, and almost every word of the Article has been minutely examined before the Commission. As this case remains *sub judice*, you will not expect me to say more. I think, however, that I may say this much without indiscretion. The task of inquiring into a government's appreciation of the extent of an emergency and of the measures required to meet it is manifestly both delicate and difficult. The Commission, however, had no doubt that it has both the competence and the duty to make that inquiry.

That completes the broad picture of the rights and freedoms the Commission is called on to protect. I think that it is true to say that, apart from the right to a freely elected legislature, every one of them has been raised before us in some form or another.

Now let us look a little more closely at the Bill of Rights from a constitutional point of view. Very interesting, it seems to me, is the status of the Convention and Protocol within

the legal systems of Member States. In six countries these instruments do not have the force of law, namely, in the four Scandinavian countries, in the United Kingdom, and in the Republic of Ireland. In those countries the constitution does not give treaties the force of law nor has any special law been promulgated to give the Convention and Protocol the force of law. The courts of these countries, therefore, are not competent to give effect to the European Bill of Rights as such. In them the rights and freedoms of the individual derive from the local law alone and the most that the courts can do is to take inspiration from the European Bill of Rights in dealing with doubtful points in the domestic system. That this is the position in the Republic of Ireland was expressly so decided by the Irish Supreme Court in a recent case¹ and the position is, I believe, roughly the same in the other six countries I have named.

The legal systems of eight countries, however, do give the Convention and Protocol the force of law. In the Benelux countries, in Germany, Italy, Turkey and Greece, after receiving parliamentary approval and being promulgated, the two instruments did acquire the character of Statute law applicable in the domestic courts. In Austria, the latest adherent to the European Bill of Rights, the position is even more striking, for there the Convention and Protocol have been made part of the fundamental law of the constitution. In Greece, the courts have already been called on to consider whether Greek law concerning freedom of religion is consistent with the Convention. German courts also have applied the Convention in a number of cases. In one case² the court set aside an expulsion order against a Belgian, who was married to a German woman, on the ground that it compromised the unity of the family life as guaranteed by the Convention and in the particular circumstances was not justifiable as a measure necessary in a democratic society for the protection of public order. You will appreciate that, when the local courts have previously applied the Convention and the case then comes before the Commission, it may find itself almost in the position of a Court of Appeal.

Whether or not it makes the European Bill of Rights part of its domestic law, every Member State is now under an international obligation to ensure that its laws are in conformity with the Bill of Rights and, if necessary, to amend them so as to produce that situation. No government can excuse a violation of the Convention by saying to the Commission, 'We could not help ourselves because it is our law'. Norway, therefore, having regard to the guarantee of freedom of religion, has amended an historic provision in her constitution under which Jesuits were forbidden to enter the country. A few States have made one or two particular reservations when signing the Convention.³ Otherwise, Member States seem to have assumed that the Bill of Rights is already fully expressed in their laws.

So much for the declaration of our rights and freedoms: Dicey, the classical authority on the rule of law, used to say that what matters is not formal declarations of rights but legal remedies.⁴ Within the Council of Europe human rights and freedoms find in the great majority of cases their full protection in each State's own system of law and remedies. The special international remedies of the Convention are merely superimposed on the State system of remedies as a final guarantee of protection. That the international remedies are to be employed very exceptionally and as a last resort is made very plain by Article 26:

'The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law and within six months of the date on which the final decision was taken.'

¹ 1958 Irish Reports.

² *This Year Book*, 33 (1957), p. 317.

³ For example, the United Kingdom in signing the Protocol declared that in view of certain provisions of the Education Acts in force in the United Kingdom, the obligation in Article 2 'to respect the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions' was accepted only so far as compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.

⁴ *Law of the Constitution* (9th ed., 1939), pp. 198-9.

Every case brought before the Commission, whether by an individual or a Member State, is covered by this Article. International law recognizes certain exceptions to the exhaustion of local remedies, such as when the courts would be certain to give an adverse decision or when the remedy itself would be ineffective or insufficient. The Commission gives full effect to these exceptions but it cannot take up any case unless it is satisfied that the local law provides no further effective remedy.

The Convention speaks of the collective enforcement of human rights and every Member State is expressly given the right to refer a case to the Commission. Thus any Member may find its treatment of its own nationals called in question by another Member, as has happened in the two cases concerning Cyprus. This right of Members of the Council of Europe to intervene on behalf of another State's nationals is in itself a very notable feature of the Convention. Many authorities, however, have represented that the right of the individual himself to file a complaint with the Commission independently of any State is essential for the protection of individuals against ill treatment by their own government. They urge that one member is very unlikely to bring another before the Commission unless the victim is its own national or unless it has special political reasons for doing so. Moreover, individuals will not readily place their grievances before a foreign government and ask it to sponsor their case before the Commission. If you regard the Convention as a constitutional instrument—as a European Bill of Rights for the individual—then it seems difficult to deny the importance of granting to the individual a personal right to place his grievance before the Commission. If, on the other hand, the Convention is regarded rather as a pact for collective action to check the development of any totalitarian methods of government in member countries, then the individual's right of recourse to the Commission may seem less important than that of Member States.

The Convention compromised on the point. Under Article 25 it was left to each Member State to decide whether or not it would recognize the individual's personal right of action. You have already heard that up to date nine States have done so and five States—the United Kingdom, the Netherlands, Italy, Greece and Turkey—have not. In the nine States anyone of any nationality whatever may file a complaint with the Commission against the government concerned. You may therefore wonder whether the failure of the five States to make declarations under Article 25 does not create a rather unequal position. For example, an Italian in Belgium may complain directly to the Commission about the Belgian Government, while a Belgian in Italy does not have a similar right against the Italian Government. That is true; but you must also remember that, although France has not ratified the Convention at all, a Frenchman may file a complaint against Belgium or against the other eight countries. So too may the national of a State which does not even belong to the Council of Europe. The Commission has already had applications from Frenchmen and from nationals of outside States and indeed from stateless persons. A declaration, once made, benefits everyone regardless of nationality.

Some people feared that there would be a great flood of futile applications which would drown the Commission. It has had this jurisdiction for about three years and it has received almost exactly 400 applications from individuals. If that does not amount to a great flood, it is certainly a big number. Nevertheless, the Commission has contrived without too much difficulty to avoid being submerged by the applications from individuals.

The Rules of Procedure make a sharp distinction between applications by States and those by individuals. A State application is sent immediately to the respondent State for its observations. The procedure for individuals is more complex. The Secretariat prepare an elaborate dossier which is referred to three members of the Commission. This group of three goes into the application thoroughly, forms a *prima facie* opinion on its admissibility and draws up a report. Only if the group of three is unanimous in thinking that *prima facie* the application is admissible, is it immediately sent to the government for its observations without being brought before the Commission. In all other instances the report is first considered by the full Commission. In most cases the Commission quickly sees that the application is totally inadmissible on one ground or another. If any real doubt exists as to the admissibility of the application, the Commission does not proceed

to a decision but sends the case to the government for its observations. The applicant is then invited to reply to the government and on three occasions the Commission has held an oral hearing before deciding the question of admissibility.

One writer¹ has jokingly observed that the procedure seems to be more designed for the protection of governments than of individuals and the witticism has some element of truth in it. The experience of the past three years, however, has entirely justified the procedure. It has enabled the Commission to give serious attention to the more substantial cases and has prevented the individual's right of application from becoming a wholly unjustifiable burden on the administrative services of Member Governments. Up to date the Commission has dealt with about 360 cases from individuals.² Two cases, after being referred to governments and after oral hearings, have been held to be admissible. Seven further cases were referred to the government concerned for its observations on the question of admissibility. One of these was declared inadmissible after obtaining both written and oral explanations from the parties. Four others were declared inadmissible on the basis of written pleadings alone. In the sixth case, the government concerned, without accepting any legal responsibility, recognized that the case was one of serious hardship and made a very reasonable offer of financial assistance. The seventh case has not yet been decided.

All the remaining cases have been declared inadmissible without reference to the government concerned. Very often there is more than one ground for holding the case inadmissible. In many cases the applicant has failed to exhaust the local remedies. In many others the complaint related to matters which occurred long before the Convention came into force; for example, a large number of the cases brought against the Federal Republic of Germany relate to the acts of the Hitler régime. Sometimes the application is aimed at a State which is not a Party to the Convention or against a private individual. Sometimes the right claimed is not mentioned in the Convention, like the right to a nationality, to a profession, to work, to a pension or to a standard of living. Then there are cases, mainly from persons of weak mind, where it is not possible to discern what really is the violation of the Convention which is alleged.

There is also a substantial block of cases which the Members of the Commission refer to amongst themselves as cases of *quatrième instance*. Articles 5 and 6 of the Convention guarantee to each individual a fair and impartial handling of any civil or criminal case to which he may be a party. They lay down certain minimum standards for judicial proceedings. They do not, however, give the individual a guarantee that the court's decision shall be correct on the facts and the law. The function given to the Commission in reviewing decisions of the local courts is only that of a watchdog to see that the minimum standards have been observed in the handling of the case. That the Commission has only this limited competence and is not some new kind of super-supreme tribunal—a *quatrième instance* for each Member State—is little understood by individual applicants. Numerous persons, who believe themselves to be the victims of erroneous judgments in a civil or criminal case, file a complaint without alleging an irregularity in the proceedings.

I hope that I have made it clear that no government need shrink from accepting the Commission's jurisdiction under Article 25 out of any fear of being called on to deal with innumerable petty and groundless complaints. At the same time I should not like you to carry away the impression that the protection given to governments by the Commission has been at the expense of the protection of the individual. I give you the most complete assurances that, despite the negative results of much of our work, the Commission adopts an extremely positive attitude towards the discharge of its responsibilities under the Convention.

In order to present a more balanced picture of our work, I shall give a few examples of this positive attitude. In some cases the Commission found that the authorities of a prison or mental home were refraining from forwarding the complaint of an inmate with the best intentions of keeping the Commission from being troubled with a futile case. It held

¹ Dupuy, *Annuaire Français de Droit International*, 3 (1957), p. 451.

² A number of the Commission's decisions will be published shortly in its *Year Book*.

that the defenceless position of persons in prison or in a mental home makes it essential for the Commission to retain in its own hands the decision as to whether any notice is to be taken of a complaint from such sources. Representations were promptly made to the governments requesting that general instructions in this sense be sent to the relevant authorities. These representations met with the fullest co-operation from the governments. Again, although the Commission has rejected a considerable number of cases *ratione temporis*, because they related to matters occurring before the entry into force of the Convention, it has sought to place strict limits on the operation of this rule. It has held that under certain conditions a situation which began before the entry into force of the Convention may by reason of its repeated and continuing effects escape from the *ratione temporis* rule. It has also held that if the original wrong occurred before the Convention came into force but legal proceedings to remedy the wrong have been taken afterwards, the Commission is entitled to investigate the propriety of the subsequent proceedings, even although the original wrong is outside its jurisdiction.

These are only a few examples of the positive approach of the Commission towards the application of the Convention. The negative decisions it is so often called upon to give result from the facts of the case and not from any shyness on the part of the Commission to assume jurisdiction. The proportion of negative to positive decisions on the question of admissibility may seem very heavy. But I do not think that it is surprising. After all, the States involved in these cases are united together in the Council of Europe for the very reason that their legal systems are based on respect for the principles of the Human Rights Convention. If the proportion of positive to negative decisions was very much higher, you might ask yourselves what was happening to democracy in free Europe. The essence of our democracy is that the rights and freedoms of the individual are protected by our local laws and courts. None may approach the Commission until all possibilities of a remedy being obtained through them have been exhausted. We should not therefore expect very much to be left over for the Commission to take up.

No doubt, some will be found to regret that the number of positive decisions by the Commission has not been higher. I venture to think that the number may increase a little when the significance of the Convention and of the individual's remedy before the Commission is more generally appreciated among the legal professions in member countries. I have the impression that very few lawyers in member countries have any awareness of the Convention as a legal instrument which might one day be of concern to them in their own practice. Yet the Convention is such a legal instrument, and especially in the nine countries which recognize the individual's right of recourse to the Commission. The United Kingdom is one of the five countries which do not recognize the individual's right of recourse to the Commission and the legal significance of the Convention seems to have made little impact on lawyers there. Yet the Convention ought in many ways to be of outstanding interest to English lawyers. The famous unwritten constitution of Great Britain has never been quite so unwritten as some people have supposed. But we have certainly had no written constitutional guarantees of such rights as the right to a fair and public trial, to respect for private life and correspondence, or such freedoms as freedom of thought, assembly and association. Is it not a matter of the greatest interest that these written guarantees are now superimposed on the British constitution by a legal instrument operating within the larger framework of the Council of Europe? I believe it is, but I do not think that you will find any mention of it in English works on constitutional law. The divorce between domestic and international law is still so large.

In the democracies of free Europe the legal professions play a vital role in securing respect for the rule of law. I do not believe that the Convention can come to its full operation until the legal professions in the several Member States recognize it as part, if an exceptional part, of their law. I believe that nothing would more greatly strengthen the Convention than promoting a wider teaching of it amongst lawyers. 'Taught law', said the great English historian and lawyer, Maitland, 'is tough law.' The Convention must be taught if it is to have a real place in the law of Europe.

Perhaps we have as yet had too short an experience to enable us to form a final judgment on the Convention. But I believe that it is proving, and will prove, valuable. Even in the political life of the best regulated democracies there may from time to time be aberrations. Never have the problems posed by government and politics been greater than today. In the three short years of its life, the Commission has been brought up against some of the most fundamental problems of government and of human rights. The situation in Cyprus, the activities of the so-called Irish Republican Army in Ireland, and the activities of the Communist Party in the Federal Republic of Germany have all given rise to legal problems under the Convention which are of elemental importance. On a smaller canvas, the Commission has had a number of cases raising important issues of private rights and freedoms.

Close experience of the working of the Convention has, I think, shown that it was on the whole well-conceived and well drafted. That does not mean that it is a perfect instrument. I feel rather strongly that the rigid division of competence between the Commission and the Sub-Commission in regard to the investigation of the facts and the search for a friendly settlement is undesirable. As soon as the Commission has declared a case to be admissible, it is required immediately to set up a Sub-Commission of seven members to which the Convention entrusts two specific tasks. The first task is to ascertain the facts and for this it is expressly empowered to conduct an investigation, like the one carried out in Cyprus early in 1958. The second is to place itself at the disposal of the parties with a view to arranging a friendly settlement on the basis of the human rights guaranteed in the Convention. I think that the formal allocation of the competence to perform these tasks to a Sub-Commission is a mistake. It tends to cause delay and to impede the smooth and effective handling of the case as well as having other disadvantages. I think that it would have been better simply to leave the two tasks within the competence of the Commission and to give it discretion to work out its own procedures for discharging them.

The Convention was clearly right, however, to make the Commission's task of conciliation the central feature of the remedies which it provides. Investigation of the shortcomings of a State in regard to human rights is a very delicate form of intervention in its internal affairs. The primary duty of the Commission is to conduct confidential negotiations with the parties and to try and set right unobtrusively any breach of human rights that may have occurred. It was not primarily established for the purpose of putting States in the dock and registering convictions against them. Of course, if no settlement is obtained, the Commission reports on the whole case to the Committee of Ministers and then the Commission will say whether or not there has been a violation of the Convention. But the matter still remains confidential and it is for the Committee of Ministers alone to decide whether the Commission's report is to be published. So, you see, the Commission's role is diplomatic as well as judicial.

The judicial role of the Commission needs a word of explanation. At the very first stage of a case when it decides whether an application is admissible at all the Commission is clearly nothing more nor less than a judicial tribunal. If it decides against admitting the case, that is an end of the matter. No further proceedings can take place under the Convention. On the other hand, at the final stage of the case when the Commission reports to the Committee of Ministers, the power of decision really belongs to the Ministers. The Commission's findings then have the character more of the findings of a jury of experts, that is, experts on human rights in the free democracies of Europe and on international law. Members of the Commission have, as it were, to testify as to what is the common legal view in free Europe of a particular right or freedom and, in addition, to apply all relevant rules of international law. This is a very interesting task. I myself have been much struck at the comparative ease with which we are able to reconcile the differences between the legal systems of the respective countries and reach a common view on the essential point involved. The experience of the Commission therefore strongly confirms the genuineness of the unity of legal concepts of human rights on which the Convention is based.

I should like now to conclude with a few words about the Commission itself. I should be failing in my duty if I did not pay full tribute to the extraordinary contribution made by M. Modinos and the remainder of our Secretariat to the smooth establishment and effective working of the Commission. With their indispensable aid I have little fear of the Commission finding unmanageable the large mass of inadmissible petitions from individuals. I have more fear that the Commission, as at present constituted, may not be able to manage the few substantial cases which it retains. Its members nearly all have heavy responsibilities in other spheres of life and it only requires one or two big cases, like the Cyprus cases, to make the organization of the work extremely difficult. My view is that, if there is any increase in the number of substantial cases, the Commission may have to be reorganized to enable it to function more continuously.

C. H. M. WALDOCK

CASE NO. 1, BETWEEN THE SWISS CONFEDERATION AND THE FEDERAL REPUBLIC OF GERMANY, UNDER THE ARBITRATION TRIBUNAL FOR THE AGREEMENT ON GERMAN EXTERNAL DEBTS

THE *Aargauische Hypothekenbank*, a company limited by shares (*Aktiengesellschaft*), whose head office is at Brugg, Switzerland, had acquired a plot of land situated in Stuttgart, Germany, at a forced auction sale in order to safeguard a mortgage on this land registered in its name. This company (subsequently referred to as A.H.) sold the land in 1931 to Lindauer, a firm of Stuttgart merchants. The contract referred twice to A.H. having its head office in Brugg, and paragraph 5 read as follows:

'Interest is payable on the total purchase price from October 1, 1931, at 6½% annually. The interest is to be paid at the end of each calendar quarter and for the first time on December 31, 1931, free of charge to the vendor or to a pay office (or "payee", in German *Zahlstelle*) to be specified by it; the same applies to the payment of the purchase price and the several instalments.'

A postponement of the balance of the purchase price amounting to Goldmarks 300,000 was granted to the purchasers. In order to secure this claim another mortgage on the land was registered in favour of A.H. Lindauer sold the land in 1937 to Tack, then a Berlin firm and now at Weinheim. Tack took over as debtor the mortgage claim of A.H. as a set-off against the purchase price. After repayment of an instalment in 1940 the mortgage debt amounted to Goldmarks 220,000.

The war and post-war occupation interfered with payments on German external debts, but on 27 February 1953 there was concluded in London between the Federal Republic on the one hand and its creditor countries on the other hand the Agreement on German External Debts.¹ Annex II, Article V, paragraph 3 of this Agreement provided for the settlement at a conversion rate especially favourable to foreign creditors of 'such financial debts and mortgages, expressed in Gold Marks or in Reichsmarks with a gold clause, as had a specific foreign character'. Annex VII was entitled 'Agreement on Goldmark Liabilities and Reichsmark Liabilities with a Gold Clause, having a specific foreign character', and Section I, paragraph 2 thereof included within the definition of the expression 'specific foreign character' the following: 'Claims expressed in Goldmarks, or in Reichsmarks with a gold clause or a gold option, arising from other loans or advances resulting from financial transactions and raised abroad by German debtors, including claims of this kind secured by

¹ Cmd. 8781.

mortgage charges; if (a) it was expressly agreed under the original written debt arrangements that the place of payment or the competent court is situated abroad or foreign law is applicable. . . .'

Tack seems to have been willing to settle the debt but endeavoured to secure the indemnity from the German financial authorities provided for in the Federal Law of 24 August 1953 for the implementation of the London Agreement. The question therefore arose whether the 1931 contract between Lindauer and A.H. had a 'specific foreign character' within the meaning of that Agreement. The German authorities took the view that paragraph 5 of the contract contained no express agreement on the place of payment, but Switzerland contended that, as it had twice been mentioned in the contract that the head office of A.H. was at Brugg, it was reasonable to infer that the place of payment was to be abroad. This interpretation was said to be strengthened by the fact that paragraph 5 of the contract provided that interest was to be paid 'to the vendor or to a pay office to be specified by it'.

The difference was referred by Switzerland to the Arbitral Tribunal set up under Article 28 of the Debt Agreement. Germany, however, contested the jurisdiction of the Tribunal on the following grounds: (i) local remedies had not been exhausted; (ii) the dispute was between private parties and not between the States parties to the London Agreement; and (iii) the proper body to decide disputes arising out of Annexes to the London Agreement was not the Arbitral Tribunal provided for in Article 28 of the main Agreement but the Arbitration and Mediation Committee provided for in Article IX of Annex II.

In reply Switzerland contended (i) that, since the dispute concerned the interpretation of a number of Annexes to the London Agreement, and not merely one, the main Arbitration Tribunal was competent; (ii) that, since the creditor's real opponents were the German financial authorities, the dispute was an inter-State matter and not merely a private dispute between A.H. and Tack; and (iii) that the London Agreement, as a 'self-contained *lex specialis*', did not permit the application of the rule of exhaustion of local remedies. It was argued that foreign creditors had merely a right, but not the duty, to resort to German courts.

In answer to questions raised by members of the Arbitration Tribunal it emerged that, between 1931 and 1933, interest had been paid in quarterly instalments to the head office of the creditor in Brugg; that after 1933 only a portion of the interest had been paid in this manner, while the remaining portion had been transferred to the creditor through the German-Swiss clearing system via the Conversion Office for German External Debts; and that Tack had continued this method, the last instalment having apparently been paid on 30 June 1944.

On the question of competence the Tribunal held unanimously that it was competent to adjudicate upon the dispute. On the question of merits the Tribunal held by five votes to four that 'within the meaning of paragraph 2 (a) of Section I of Annex VII to the Agreement on German External Debts of February 27th, 1953, it was expressly agreed in the contract of July 31st, 1931, between the Aargauische Hypothekenbank AG. and Herren Max and Moriz Lindauer that the place of payment of the Goldmark claim created by the said contract was situated abroad'. Despite the close vote on the merits the Tribunal is to be congratulated upon having presented a careful and well-reasoned Award.

Dealing with the objection based on the failure to exhaust local remedies, the Tribunal held that it must apply the generally accepted rules of international law, and that the rule requiring the exhaustion of local remedies was such a rule. The Tribunal held further that, unless the rule was expressly excluded, it was applicable to the interpretation of international treaties even if such treaties had not expressly stipulated the

observance of the rule. It thus disagreed with the view expressed by Judge van Eysinga in his Dissenting Opinion in the *Panevezys-Saldutiskis Railway* case.¹ But the Tribunal also held that the rule is only applicable in cases where a foreigner's rights have been infringed and where 'the person whose rights have been infringed has not exhausted the remedies legally available to him in the State against which the claim is made, in order to assert the infringement of his rights' (*sic*). After referring to the case of the *Finnish Ships*² and the *Norwegian Loans*,³ and in particular to Sir Hersch Lauterpacht's Separate Opinion in the latter case, the Tribunal expressed approval of the opinion of the Arbitration Tribunal in the *Ambatielos* case that the local remedies rule 'means that the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State'.⁴

The Tribunal referred to the Federal Republic's attempt to show that there are tendencies in the more recent development of international law which amount to an extension of the applicability of the rule of the exhaustion of local remedies, but seemed altogether disinclined to accept this point of view. For its part the Tribunal pointed out that 'the International Court of Justice has . . . always adopted a very cautious attitude towards the objection that local remedies had not been exhausted'. It also came to the conclusion that the rule did not apply to the present case at all because Switzerland was not making a claim for damages against the Federal Republic but was merely requesting a decision of the Tribunal on the interpretation and application of Annex VII of the Debt Agreement. Taking this view of the case, the Tribunal held that it was not necessary to examine what local remedies, if any, were available to the creditor.

The view that the case was primarily about the interpretation and application of Annex VII rather than a dispute over the contract between A.H. and Lindauer also enabled the Tribunal to dispose of the objection that the case concerned a dispute between private parties and was not an international matter. The Tribunal further interpreted Article 28 of the Debt Agreement as meaning that 'the Arbitral Tribunal has exclusive jurisdiction in all disputes between two or more of the Parties to the Agreement regarding the interpretation or application of the Agreement, or the Annexes thereto, which the Parties are not able to settle by negotiation, unless a dispute concerns solely the interpretation or application of an Annex to the Agreement if an arbitral body established pursuant to such Annex is competent to decide the question of interpretation or application concerned'.

Since the case concerned the interpretation or application of more than one Annex, and in particular did not concern Annex II alone, the Arbitration Tribunal decided that it, rather than the Arbitration and Mediation Committee established under Article IX of that Annex, was the competent body. This part of the Award is somewhat technical and, not being of general interest, need not be discussed here. But, in answer to an objection that A.H. should have gone before the Arbitration and Mediation Committee, the Tribunal made some interesting observations on the principle of *perpetuatio fori*. It was pointed out that, when the Application was filed by Switzerland,

¹ *P.C.I.J.*, Series A/B, No. 76, p. 35.

² *Reports of International Arbitral Awards*, vol. iii, p. 1479.

³ *I.C.J. Reports*, 1957, p. 9.

⁴ *Award of the Commission of Arbitration established by the Agreement concluded on 24 February, 1955 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Greece for the Arbitration of the Ambatielos Claim* (London, H.M. Stationery Office, 1956), p. 27.

this other body had not yet been established; but that, while the case was before the Arbitration Tribunal, the other body had become established. The Tribunal endorsed the remarks of the International Court of Justice in the *Nottebohm* case (Preliminary Objection),¹ where the Court had held that, once a valid Application has been filed, the Court must deal with all aspects of the claim, whether they relate to jurisdiction, to admissibility or to the merits; and that extrinsic facts, such as the lapse of the Optional Clause Declaration of one of the Parties, cannot deprive the Court of a jurisdiction already established. This principle, said the Tribunal, applied to the present case, so that 'once the competence of the arbitral body has been established by the submission of the Application for a decision, extrinsic facts and circumstances no longer affect this competence'.

The Tribunal disposed no less summarily of an objection that negotiations had not been exhausted. What it had to say on this point was not new but, since it is of general interest, it may be quoted. 'The Arbitration Tribunal (the relevant passage reads) . . . is not of the opinion that, in order to establish its competence to decide a dispute between two or more of the Parties to the Agreement, diplomatic negotiations must always have reached a point where the litigating Parties have stated expressly that they have not succeeded in settling the dispute by negotiation. It suffices, on the contrary, that it can be assumed from the circumstances that a continuation of the diplomatic exchange of letters will not make possible the settlement of the dispute.' Although this passage is in accord with precedent, a limit must surely be placed somewhere to the extension of this principle. Obviously, at the outset of negotiations, the Parties are bound to start from very different positions. It would frustrate the whole purpose of diplomacy if this situation were always to be interpreted as a failure to settle the dispute by negotiation.

On the merits the principal task confronting the Tribunal was to decide what meaning to give to the words in Annex VII 'it was expressly agreed under the original debt arrangements that the place of payment . . . is situated abroad'; and then to decide whether this requirement was fulfilled in the contract between A.H. and Lindauer.

It was argued by the Federal Republic that the Tribunal should first determine the proper law of the contract, which in this case was German law, and then hold that under German law the debt was not a 'callable debt' (place of payment is the residence of the debtor), nor a 'deliverable debt' (place of payment is the residence of the creditor), but a 'transmissible debt' (place of payment is the residence of the debtor who is, however, obliged to transmit the money owed at his cost and risk to the creditor). The Federal Republic further argued that, under German private international law, the applicable law is determined by the 'centre of gravity' of the debt relationship, and that in the case of a sale of land situated in Germany to a German, the sale being authenticated by a German notary public and the purchase price being specified in German currency and secured by a mortgage on German land, the centre of gravity of the relationship was clearly German.

The Tribunal, however, declined to follow this method. It said that if, in every dispute arising under this part of Annex VII, the proper law of the contract had first to be determined, a complex preliminary matter would have to be decided before the criteria of Annex VII could be applied. That could hardly have been the intention of the framers of the London Agreement. Moreover, contracts of the same wording would be interpreted differently according to which law was applicable to them. The Tribunal preferred to follow instead the practice of the International Court of Justice according to which words and phrases are to be given their normal, natural, and un-

¹ *I.C.J. Reports*, 1953, p. III.

strained meaning in the context in which they occur. This the Tribunal found easier to say than to do, and the reasoning by which it held that the contract of 1931 constituted an express agreement that the place of payment would be abroad is far from simple.

The Tribunal held that the word *Zahlungsort* (place of payment) in Annex VII was not synonymous with the word *Leistungsort* (place of performance) which appears in Sections 269 and 270 of the German Civil Code. *Leistungsort* means the place of the residence of the debtor even when the residence of the creditor is at another place. But, said the Tribunal, *Zahlungsort* had in this context a non-technical meaning, rather like 'place of payment' in English law. At this point the Tribunal cited Dr. F. A. Mann to the effect that 'in English law the conception "place of payment" connotes the place at which the creditor is entitled actually to receive the money due to him, not the place from which the money is to be dispatched to him or at which any other step preparatory to payment must be taken'.¹

As for the meaning of the words 'expressly agreed', the Tribunal held that this phrase was not equivalent to *expressis verbis* but included as well any unambiguous evidence of the intention of the parties. *Inter alia*, the Tribunal relied upon the English case of *Charlton v. Lings*, where it was stated by Byles J.:

'The difficulty, if any, is created by the use of the word "*expressly*". But that word does not necessarily mean "expressly excluded by words". . . . The word "*expressly*" often means no more than plainly, clearly, or the like, as will appear on reference to any English dictionary.'²

The Tribunal pointed out that it was twice mentioned in the contract that the head office of A.H. was at Brugg; that neither at the date of the contract nor thereafter had A.H. a branch office in Germany; and that from 1931 to 1944 the interest payments made by the debtors had been transferred with the authorization of the German foreign exchange authorities and paid to the creditor in Brugg in Swiss francs.

President Sverre Daehli, former Judge of the Supreme Court of Norway, added an Individual Opinion on the question of competence, as did Mr. Alfred Michelson on the merits. Professor Barandon, Herr Bernhard Wolff, Professor von Caemmerer, and Professor Makarov contributed a Joint Dissenting Opinion on the merits. The gist of their argument was that the purpose of Annex VII was to provide for certain loans and pecuniary claims expressed in Goldmarks or in Reichsmarks with a gold clause or a gold option an exception from the principle that claims of this kind due to foreign creditors should be converted into Deutsche Mark at the rate of 10:1 in the same manner as corresponding claims of inland creditors; that a conversion at the rate of 1:1 of such claims due to foreign creditors was to be effected only under exceptional conditions; and that the criterion adopted for the distinction between preferred and non-preferred claims was the determination whether the claim had a 'specific foreign character' or not. This expression should be strictly construed. It in no way sufficed that the pecuniary claim merely had a foreign character. The foreign character had to be 'specific', and here the 'centre of gravity' argument came into its own. In terms of international law the dissenting arbitrators were thus rather more ready to examine both the purposes of the Debt Agreement, and the circumstances of its negotiation (*travaux préparatoires*), than were the majority. The minority also took the view that 'the place of payment' should be determined according to the proper law of the contract, i.e. German law. This was the only method which would lead to clear and practicable solutions.

¹ *The Legal Aspect of Money* (2nd ed., 1954), p. 174.

² (1868) L.R. 4 C.P. 374, 393.

As the majority opinion had shown, the attempt to give a non-technical meaning to a legal expression like 'place of payment' was fraught with risks. Comparative law provided no reliable guide because there were profound differences between the various systems on this point. The French, German and Austrian systems on the whole regarded the residence of the debtor as the place of payment, but the English, American, Swiss, Italian and Greek systems tended to apply the rule that 'the debtor must seek the creditor'. The minority answered in the negative the question 'whether . . . the concept of those laws which make the residence of the creditor decisive, as being the predominant rule in the Anglo-American legal area and of late being frequently followed outside this area, could have priority in the interpretation of the Agreement'. In any case the rule that 'the debtor must seek the creditor' had no relevance to external liabilities. Finally, the minority took the view that it had not been 'expressly agreed' in the contract of 1931 that the place of payment should be abroad.

It will already be clear from this summary that this case, although turning on some technical points in the highly complex London Debt Agreement, is full of interest to the private international lawyer, the comparative lawyer and the specialist in international economic law, as well as to the general public international lawyer. There cannot be many cases in the history of international arbitration which comprise, in one and the same Award, illuminating passages on such diverse questions as the local remedies rule, litispence, the principle of *perpetuatio fori*, the requirement that the possibilities of diplomatic negotiation be exhausted before resort is had to international litigation, and the interpretation of treaties, as well as on a whole range of problems in private international law and comparative law.

D. H. N. JOHNSON

DIPLOMATIC IMMUNITIES—SOME MINOR POINTS

THIS paper is composed of largely unconnected notes on certain relatively unimportant topics of diplomatic immunity which appear to be ill understood, insufficiently treated or neglected by writers on international law. These topics are (1) bankruptcy proceedings, (2) exemption from billeting, (3) the right of chapel, (4) exemption from coroners' inquests, and (5) the right to fly the national flag. They will here be reviewed and in certain cases the scantiness of the material available made the pretext for speculation as to the principles to be applied.

The correct view of the general nature and basis of diplomatic immunity, it is submitted, is that of Hall, who in his *Treatise on International Law*¹ writes:

'Diplomatic immunities are required on the ground of practical necessity. . . . It is in the interest of the State accrediting a diplomatic agent, and in the long run in the interest also of the State to which he is accredited, that he should have such liberty as will enable him, at all times and in all circumstances, to conduct the business with which he is charged; and liberty to this extent is incompatible with full subjection to the jurisdiction of the country with the government of which he negotiates.'

Postulating that immunities are promoted by considerations partly of courtesy and partly of 'convenience so great as to be almost equivalent to necessity', Hall goes on to suggest that this convenience is the more proper basis for the grant of immunities—it 'corresponds with the present temper of States'.

¹ (8th ed. by Higgins, 1934), §§ 218-19.

A diplomatic envoy, then, must be so far exempt from the operation of the territorial jurisdiction of the country where he is stationed as is necessary to secure the free exercise of his functions. This is far from claiming an absolute immunity at all times and for all purposes; there must be a limit, even if the limit may lie in a debatable land. It lies at a point where the requirements of the law and order and the security of the receiving State override the requirements of convenience; and the right to immunities must then cease to exist or be subject to modification. At that point the receiving government is justified in calling upon the ambassador to comply with the rules of behaviour, or even to submit to the restraints, which are incumbent upon all who are physically present within the realm, upon all aliens there, or (as the case may be) upon all enemy aliens there.¹

(i) *Bankruptcy*

Because bankruptcy is purely a matter of proceedings in court, ambassadors and bona fide members of their staff, who are exempt from civil process, cannot be made bankrupt.² The words 'bona fide members of' are added because in the well-known case of *Re Cloete*³ one who was the Consul-General for Persia was during bankruptcy proceedings against him appointed to be an honorary attaché of the Persian Embassy. The Registrar nevertheless made a receiving order against him and when Cloete appealed to the Court of Appeal, Lord Esher M.R., dismissing the appeal, said: 'Now, I doubt whether he, being a British subject, could have claimed this privilege even if his appointment had been obtained with an honest purpose. . . . But it has always been the law of England that a person cannot claim the privilege of an embassy if he is not a *bona fide* member of the embassy.' In view of the decision in *Macartney v. Garbutt*,⁴ it would seem that the fact that the debtor was a British subject would have made no difference to his enjoyment of the privilege had his position at the Persian Embassy been obtained bona fide.

The immunity of diplomatic envoys from the jurisdiction of the English courts is established by the Diplomatic Privileges Act, 1708, which makes writs and processes—which expression presumably includes bankruptcy proceedings—utterly null and void. Section 5 of the Act,⁵ however, provides that 'no merchant or other trader whatsoever within the description of any of the statutes against bankrupts who hath or shall put himself into the service of any ambassador shall have or take any manner or benefit by' the Act.⁶ Now, Cloete 'had embarked on speculative business', i.e. he was a trader. This would seem to entitle us to say that it would have made no difference to Cloete even had his position at the Persian Embassy been obtained bona fide: he would still have been subject to the jurisdiction of the bankruptcy court.

It has more than once been said⁷ that the Act of 1708 is declaratory of the common law and it seems to follow that quite apart from Section 5 of that Act the bankruptcy court would have jurisdiction over diplomatic envoys and the many other persons who

¹ It is hoped to deal in a subsequent paper with the position of diplomatic envoys in time of war.

² See Ringwood, *Principles of Bankruptcy* (17th ed., 1936), p. 7. Williams's *Law and Practice in Bankruptcy* (16th ed., 1949) is quite obscure on the point; half a page is devoted to the method of proof of the status of a person claiming the privilege, *et praeterea nihil*.

³ (1891), 65 T.L.R. 102.

⁴ (1890), 24 Q.B.D. 368.

⁵ Which was annexed to the original statute in a separate Schedule—see *The Statutes Revised* (1950), vol. i, p. 499.

⁶ For the similar legislation of certain other countries see Droin, *L'Exterritorialité des Agents diplomatiques* (1895), § 51. See also Dalloz, *Répertoire*, article on 'Agent Diplomatique'.

⁷ E.g. *Novello v. Toogood*, 1 B. & C. 564; *In re Suarez*, [1918] 1 Ch. 176.

enjoy 'the like immunity from suit and legal process as is accorded to an envoy of a foreign sovereign Power accredited to Her Majesty', under the various Diplomatic Privileges (Extension) Acts of this and the previous decade, but who engage in trade and become insolvent.

(ii) *Exemption from Billeting*

A privilege which is commonly enjoyed by diplomats and which appears to be amply justified by the maxim of Grotius, *omnis coactio abesse a legato debet*,¹ is immunity from billeting. To have soldiers forcibly lodged in diplomatic premises—whether the private house of an envoy or the embassy itself—would appear not only an embarrassing invasion of privacy but also a positive hindrance to the performance of the diplomatic function. As to the *hôtel*, as one authority² points out, the security assured by international law to diplomatic agents would be compromised if the coming and going of soldiers were allowed within the embassy. And another³ claims that unless the envoy is exempt from billeting, the inviolability of his home is compromised. The exemption is said to be established by usage or convention or reciprocity,⁴ and is probably fairly universal.⁵ For all that, English writers on international law have little or nothing to say about billeting. Satow, for example, seems to take the exemption for granted—he has no mention of it.

The power to billet soldiers in England is derived from the Army Act: section 104 of the Army Act, 1881, which continued in force annually until 1956, contained in subsection (2) exemptions for '(g) the house of residence of any foreign consul duly accredited as such'. There is no mention of an ambassador's house, the protection of which may be presumed to have been left by Parliament to the rules of public international law. (The corresponding section 155 of the Army Act, 1955, prescribes the premises in which billets may be provided; no exemptions are detailed.)

In some countries a householder can pay a tax or a compounded money payment in lieu of having soldiers billeted on him; but from this, too, a diplomatic envoy must be exempt,⁶ either, it is said, because if there is a measure which is not binding on an envoy then nor is the measure which replaces it,⁷ or because he is not bound to contribute to the upkeep of the army of the receiving State seeing that 'the Ambassador is not under the protection of the local army but under the sacred principles of the law of nations'.⁸

The latter of these arguments would not appear to apply to the billeting of 'evacuated' children and others, and of persons 'engaged in essential work',⁹ which became a familiar phenomenon in the Second World War; and for the *ratio* of a claim to exemption from having such persons billeted in his house, a diplomatic envoy would have to fall back on the *dictum* of Grotius.

¹ *De jure belli ac pacis*, L. ii, c. xviii, § 9.

² Genet, *Traité de Diplomatie et de Droit diplomatique* (1931), p. 435.

³ Droin, *op. cit.*, pp. 167-8.

⁴ See Fiore, *International Law Codified* (1870) (trans. by Borchard, 1918), p. 453. Cf. Pessôa, *Projeto de Direito Internacional Público* (1911), p. 132, cited in *American Journal of International Law*, 26 (1932), pp. 164-8.

⁵ Hatschek includes under the head of 'Immunity from every kind of police restraint or compulsion' *freedom in time of peace* from billeting, thus impliedly denying any exemption in time of war—*An Outline of International Law* (trans. by Manning, 1930), p. 67.

⁶ Cf. Regulations of the Institute of International Law (Cambridge Draft of 1895), Article 9, which exempts a minister's residence from military quarterings and taxes substituted therefore (cited in *American Journal of International Law*, 20 (1926), Special Suppl., p. 155).

⁷ Droin, *op. cit.*, pp. 167-8.

⁸ Genet, *op. cit.*, p. 435.

⁹ Under the Defence (General) Regulations, 1939, Regs. 22 and 22A.

(iii) *The Right of Chapel*

It is interesting to note the variations in the treatment of this now perhaps somewhat academic topic by different writers of authority.

Phillimore, in 1855, devoted several paragraphs¹ to the right of an ambassador 'to exercise privately the rites of his own religion' though it be at variance with that of the law of the State in which he is resident.² The privilege is confined to the ambassador, his suite and 'his fellow-countrymen commorant in the foreign land'. The receiving State may prevent its own nationals from going to the embassy building for this, or indeed for any purpose. And permission for nationals of a third State to attend religious services there has been the subject of treaties.

The topic had come before the English courts in 1823, in the case of *Novello v. Toogood*,³ where the plaintiff, a British subject, was (among other things) first chorister in the Chapel of the Portuguese Ambassador. In the course of his judgment, Abbott C.J. said: 'I am of opinion that whatever is necessary to the convenience of an Ambassador, as connected with his rank, his duties and his religion, ought to be respected.' But he gave judgment against the plaintiff because the action was 'for taking the Plaintiff's goods and not for arresting his person'.

In the early editions of *Oppenheim*, the Right of Chapel (*Droit de Chapelle* or *Droit du Culte*) is given half a page to itself. In later editions the treatment of the topic is reduced to a very few lines of text, with a footnote to the effect that the *droit de chapelle*, a privilege of great worth in former times when freedom of religious worship was unknown in most States, is now of historical interest only. 'But it has not disappeared and might become again of practical importance in case a State should in the future give way to reactionary intolerance.' The right of chapel, it appears, is confined to worship 'in a private chapel inside the official residence of the envoy'. But it extends to having a chaplain, 'who must be allowed to perform every religious ceremony within the chapel', and to permitting all the compatriots of the envoy, even if they do not belong to his retinue, to take part in the service. The authorities, however, are divided on the question whether the right ever was a firmly established privilege. Vattel⁴ numbers the *libre exercice de la Religion* among the 'Droits . . . qui ne sont point attachés au Caractère de Ministre Public, mais que la coutume lui attribue presque par-tout', and Genet⁵ calls it a *privilege de courtoisie*.⁶

In 1932 Satow wrote that 'it is universally recognised that a diplomatic agent is entitled to have a chapel within his residence where the rites of the religion which he professes may be celebrated by a priest or minister'. In general, the right of the agent is now unquestioned, but Satow cited a then comparatively recent incident of 1846, when the Papal Government informed the Prussian Envoy that services in the Italian language in the chapel of his Legation would not be tolerated.⁷ And in 1947 an American writer⁸ stated that liberty of worship appears to be 'accepted doctrine'. But 'religious

¹ Op. cit., §§ 207-10.

² Citing Martens, § 225.

³ 1 B. & C. 554.

⁵ Op. cit., p. 450. Cf. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt* (3rd ed., 1878), pp. 204, 208.

⁶ Phillimore, op. cit., states that 'the erection of a chapel or church, the use of bells, and of any national symbol, is a matter entirely of permission and comity'. Cf. Hall, op. cit., p. 194, n. 2.

⁷ Satow, *Guide to Diplomatic Practice* (1917). Repeated almost unchanged in the 4th ed. (1957), §§ 403-5.

⁸ Hyde, *International Law* (2nd revised ed., 1947), vol. ii, p. 1260. See also Article X of the *Règlement sur les immunités diplomatiques* adopted in 1895 by the Institute of International Law.

⁴ Op. cit., p. 104.

services should be conducted in such a manner as not to offend the susceptibilities of the local adherents of a differing persuasion'.

Today the privilege would not appear to give rise to debate, and perhaps the true position is that expressed by Wicquefort¹ in 1682: 'The only sound principle of law on this subject is . . . Religious rights privately exercised within the ambassadorial precincts, and for his suite and countrymen, ought not to be interfered with.'

(iv) *Exemption from Coroners' Inquests*

The principal function and duty of a coroner in England is to hold an investigation into the cause of a death which appears to have been violent or unnatural, which is unexplained or which has occurred in certain other circumstances. To enable him to fulfil his duty, the coroner must have access to the body lying within his jurisdiction on which he is to hold an investigation and, if he so wishes, to the premises on which the death took place. The normal method of investigation is by an inquest held *super visum corporis*. If such an inquest is held, the coroner must also be able to summon witnesses to attend and give evidence at the inquest. (The coroner may, however, conduct investigations less formal than the holding of an inquest; and if he becomes satisfied that there are no circumstances which require him to exercise his jurisdiction, he may decide that it is not necessary for him to hold an inquest.)

The question whether on the death of an envoy diplomatic privilege extends *post mortem* so as to exempt the body of the deceased from a coroner's inquest does not appear to have been canvassed by writers on international law either in this country or on the Continent. However, according to the book which is generally regarded as the coroner's *vade mecum* and guide to his jurisdiction and duties,² diplomatic immunities and privileges 'preclude a coroner from investigating the death of a person who, if alive, would have been entitled to diplomatic immunity unless the privilege is waived. Further, the coroner will have no right of access to premises which are accorded diplomatic inviolability. Lastly, a person whose attendance as a witness at an inquest is desired may claim exemption on diplomatic grounds.'

The last two propositions would appear to be unexceptionable; they follow from the general rules of the immunity of diplomatic premises³ and the exemption of diplomatic persons from the jurisdiction of the courts of the receiving State respectively. But the authority for saying that a coroner is precluded from inquiring into the death of a diplomatic envoy is not at all clear. It is difficult to see how an ambassador can be said to be impeded in his office by the holding of an inquest on one of his staff or family. If the coroner wishes to seize the body or to take away letters or other property of the deceased, then there is room for the view that diplomatic immunity will be infringed. But to regard personal immunity (or 'inviolability') as continuing after death seems to go beyond what logic would warrant. Nevertheless, there appears to have grown up, in England at least, a practice according to which in the event of the death of a diplomatic envoy or a member of his staff or of their families, immunity from inquest is, on the one hand, generally claimed and is, on the other hand, generally granted.

The following cases have occurred since the beginning of the century. In 1905 the Korean Chargé d'Affaires in London committed suicide. In a statement to the Press,

¹ *L'Ambassadeur et ses fonctions*, vol. i, p. 417.

² *Jervis on the Office and Duties of Coroners* (9th ed., 1957), p. 22.

³ 'The immunity of domicile . . . comprises the inaccessibility of [the official residences of envoys] to officers of justice, police, or revenue, and the like, of the receiving States without the special consent of the respective envoys': Oppenheim, *op. cit.*, vol. i, p. 795. The expression 'and the like' will clearly cover the coroner and his officers.

the Consul General for Korea in London said that he was in communication with the Foreign Office and the Home Office in the matter. He thought it extremely doubtful whether an inquest would be held 'seeing that the Legation, like all Embassies and Legations of Foreign Powers, is regarded as foreign territory, to which English laws do not apply'.¹ Apparently no inquest was in fact held.

In 1913 the body of the Secretary to the Danish Embassy in London was found in the Thames, and arrangements were made for holding an inquest, but when the body was identified, the Danish Minister 'claimed the "right of immunity"'. The claim was forwarded by the Foreign Office to the Home Office and the coroner agreed that the body should be delivered up without the formality of an inquest.²

In 1916 the First Secretary to the Italian Embassy was found shot in a London hotel. The Ambassador claimed immunity and the Westminster coroner 'acquiesced'.³

In 1925 an inquest was held on the death by coal-gas poisoning at her lodgings of a typist, a member of the staff of the German Embassy. In the same year an inquest was held on the death in an aeroplane crash of the Assistant Naval Attaché for Aviation at the American Embassy.⁴

In 1934 a caretaker at the Swiss Legation was crushed to death by a lift at the Legation; an inquest was held in the ordinary way.⁵

In 1949 the infant daughter of a Soviet Consulate official died after being injured in a fire at the Russian Embassy, and the Coroner for Paddington is reported to have said: 'The Russians have requested diplomatic immunity. The Embassy is not within my jurisdiction';⁶ and no inquest was held.

In 1954 the First Secretary at the Dominican Embassy in London was fatally wounded in a pistol affray in the Dominican Consulate. According to *The Times* newspaper⁷ the question of the waiving of diplomatic immunity was considered at the Home Office, but the Home Office subsequently announced that it was not proposed to ask the Dominican Ambassador to waive diplomatic immunity to enable an inquest to take place in connexion with the shooting incident.⁸

It will be seen from the foregoing that exemption from inquest has been claimed and granted where the deceased was a member of the staff of an embassy or a member of the family of one of the staff. In each of the cases where inquests were held, the deceased was a subordinate member of the staff, but it is conceived that this fact may be fortuitous and that it does not form an exception to the rule of practice. It would appear from what has been said that the practice of granting exemption from inquest when it is claimed is fairly well established in England, but whether it can yet be said that there is a usage, or a custom, which makes the exemption an immunity the grant of which is obligatory according to international law,⁹ it is perhaps too early to say.¹⁰

(v) *The Right to Fly the National Flag*

One would imagine that it was essential for the full and efficient working of an embassy that it had an unqualified and established right to fly the flag of the sending

¹ *The Daily Telegraph* newspaper, 13 May 1905.

² *The Daily Express* newspaper, 20 May 1913.

³ *The London Evening News*, 15 February 1916.

⁴ *The Times* newspaper, 25 November 1926.

⁵ *Ibid.*, 13 March 1934.

⁶ *The Daily Telegraph* newspaper, 17 January 1949.

⁷ *Ibid.*, 13 July 1954.

⁸ *Ibid.*, 15 July 1954.

⁹ Oppenheim, *op. cit.*, vol. i, § 17.

¹⁰ See the Visiting Forces Act, 1952, section 7, for a provision excluding an inquest 'touching the death of a person having a relevant association with a visiting force'.

State, so as to be immediately identifiable by its nationals, both those who wish to transact ordinary business and those seeking to avail themselves of the right of asylum in their own embassy. So much would appear to follow from the rule *ne impediatur legatio*. Oppenheim, however, does not mention such a right,¹ unless one is to deduce it from the 'fiction of extritoriality'.² Other writers are equally reticent. Hyde³ is one of the few who deal with the topic. He postulates that the right of a public minister to display the flag of his country over his official residence would probably not be challenged at the present time in any State. Satow, on the other hand, does not mention the right of a diplomatic agent to fly his national flag, although he has much to say about the customary ceremonial flying of it on the roof or in the grounds of diplomatic houses.⁴

There is room here for some speculation on the supremacy as regards delegated legislation of municipal law over public international law. Section 249 of the Local Government Act, 1933, empowers county and borough councils to make byelaws for the good rule and government of their areas. The model form of byelaws issued by the Home Office includes under that head one controlling the display of flags. It remains to be seen whether such a byelaw would prevail over a rule of international law,⁵ assuming, as seems probable, that one exists in regard to the flying of the national flag over an embassy building. Again, Regulation 39c of the Defence (General) Regulations, 1939, gave the Secretary of State power to prohibit the display by any person in public of any flag, banner or emblem on being satisfied that such display would be likely to cause a disturbance of the public order or to promote disaffection. Nothing is known of this power ever having been exercised during the War; but it is not difficult to imagine a situation where the display of the flag or emblem of a foreign State with which this country was still at peace but with which relations were strained, might be 'likely to cause a disturbance of the public order'. If, after the Secretary of State had been moved to make an order prohibiting its display, the flag were flown at an embassy building, would the order prevail over a rule of public international law?⁵

A. B. LYONS

THE LIQUIDATION OF GERMAN ASSETS IN NEUTRAL COUNTRIES

THE endeavours by the victor Powers after the late war to secure the surrender of German assets in neutral countries was based on two ideas. The first was that it would be a means of compensating countries formerly occupied by Germany, from which property had been looted or wrongfully removed and, in many instances, sent to

¹ Although he treats of the right of 'consuls of all kinds' to put up over the door of the consular building the arms of the appointing State and its flag: *op. cit.*, vol. i, § 435 (6).

² Or the *franchise de l'hôtel*, both of which operate 'in a sense and in some respects only': *ibid.*, § 390.

³ *Op. cit.*, vol. ii, p. 1260, where in a footnote he tells of the position of the American Ambassador to Russia in 1936 as the only individual in Moscow permitted to display the American flag.

⁴ *Op. cit.*, §§ 453, 454.

⁵ A note in Holland, *Lectures in International Law* (ed. by Walker, 1933), at p. 198, reads thus: 'Ambassadors and their suites are exempt from liability in respect of nuisances, as in 1890 a resident of Shepherd's Bush, troubled by the cocks of his neighbour, the Netherlands Chancellor of Legation, had occasion to discover. W.L.W[alker].' One would have preferred to have fuller particulars, but it seems likely that the neighbour's complaint was based on a byelaw of the local authority.

neutral countries for safekeeping. The second was that German assets in neutral countries should be generally available as reparations to the countries which had suffered damage by Germany in the war, whether under the specific head of looting or not. The first idea made its appearance as early as the *Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control of January 5, 1943*.¹ In the *Declaration*, which was brought to the notice of neutral countries, the governments party to it issued a formal warning to all concerned, and in particular to neutral countries, that they intended to do their utmost to defeat the methods of dispossession practised by the governments with which they were at war. The United Nations Monetary and Financial Conference at Bretton Woods in July 1944 in its Resolution No. VI also recommended governments represented at the Conference to call upon the governments of neutral countries to take immediate measures to prevent any disposal or transfer of enemy assets or of property looted by the enemy.²

Part III of the *Protocol of the Proceedings of the Berlin Conference of August 2, 1945* (the 'Potsdam Agreement')³ introduced the idea that 'appropriate German external assets' should be a source from which general reparation claims might be met. German foreign assets in Bulgaria, Finland, Hungary, Roumania and Eastern Austria were to be made available for the satisfaction of the claims of the U.S.S.R. and Poland, German foreign assets in other countries for claims of the United States, the United Kingdom and other countries entitled to reparations. This provision of the *Protocol* was later accepted by France, and its execution by France, the United Kingdom and the United States, so far as the neutral countries were concerned, forms the subject-matter of this note.

The distribution of reparations among the United Nations, other than the U.S.S.R. and Poland, was governed by the Paris Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold of 14 January 1946.⁴ This Agreement provided in Part I, Article 6, paragraph (c), that German assets in those countries which remained neutral in the war against Germany should be removed from German ownership or control and liquidated or disposed of in accordance with the authority of France, the United Kingdom and the United States, pursuant to arrangements to be negotiated with the neutrals by these countries. The net proceeds of liquidation or disposition were to be made available to the Inter-Allied Reparation Agency for distribution on account of reparations.

The neutral countries, whether prompted by Resolution No. VI of the Bretton Woods Conference or concerned for their own interests, had been quite ready, as hostilities with Germany drew to an end or soon thereafter, to take action to block German assets in their respective jurisdictions. It also became clear at an early stage that the neutral countries generally regarded the satisfaction of their own claims against Germany as an essential part of any agreement for the liquidation of German assets in their territories. In countries such as Afghanistan, the Irish Republic and Iceland, where German holdings of assets had not been large, the satisfaction of claims in fact swallowed up all or most of the proceeds of the liquidation. A small sum was obtained from Tangier. No agreement could be reached with Turkey.

In Switzerland, Sweden, Spain and Portugal German holdings of assets were large

¹ Misc. No. 1 (1943), Cmd. 6418.

² *Proceedings and Documents of United Nations Monetary and Financial Conference, Bretton Woods, July 1-22, 1944*, vol. i, pp. 939-41.

³ Misc. No. 6 (1947), Cmd. 7087.

⁴ *United Kingdom Treaty Series*, No. 56 (1947), Cmd. 7173.

and progress towards their liquidation was slow. The necessary agreements were of a novel character and required time to negotiate. After the agreements were concluded, unforeseen difficulties, mostly of a technical, financial or economic character, inevitably arose in executing large-scale programmes of expropriation and liquidation. As time passed, the attitude both of the neutrals and of France, the United Kingdom and the United States (hereinafter usually referred to as 'the Allied Governments' or 'the Three Powers') towards Germany also changed. To the initial insistence of the victor Powers that Germany must in some measure make good the damage wrought during the war, there was gradually added the realization that Germany must be enabled to contribute to her own economic rehabilitation. The year 1949 saw the establishment of the Federal Republic of Germany. It became clear that the economic rehabilitation of Germany would be impeded if there were no attempt to settle the question of her external debt, whether the pre-war external debt or the claims of the Three Powers for sums expended in economic assistance in the early years of the occupation. The first steps were taken in 1951 in the negotiations which culminated in the Agreement on German External Debts of 1953.¹ These negotiations inevitably affected the question of the liquidation of German assets in neutral countries and the settlement of claims by the neutral countries against Germany.

In parallel with the negotiations between the creditor countries (including the Three Powers) and the Federal Republic of Germany for a debt settlement, there were the negotiations between the Three Powers and the Federal Republic for the Bonn Conventions,² which upon their entry into force on 5 May 1955 conferred upon the Federal Republic 'the full authority of a sovereign State over its internal and external affairs', subject to the reservation to the Three Powers of their rights and responsibilities relating to Germany as a whole, including the reunification of Germany and a peace settlement,³ and to certain matters not material to the present discussion.

The Bonn Conventions include the Convention on the Settlement of Matters Arising out of the War and the Occupation, Chapter VI of which contains the provisions concerning reparation, which are to apply pending a peace treaty or other final settlement between Germany and its former enemies.⁴ Article 3 of Chapter VI provides that the Federal Republic shall raise no objections against measures, which have been, or will be carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded by the Three Powers with... neutral countries, and that no claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to. Article 5 provides that the Federal Republic shall ensure that the former owners of property seized shall be compensated, and Article 4 authorizes the Federal Republic to negotiate with Portugal, Spain, Sweden and Switzerland arrangements in implementation of agreements concluded by the Three Powers with these countries concerning the nature and amount of compensation, and, unless the Three Powers specifically object, agreements on other matters concerning German external assets.

The general pattern of events is thus as follows—the negotiation by the Three Powers of an agreement with the neutral country concerned for the liquidation of German

¹ *Germany*, No. 1 (1953), Cmd. 8781.

² Cf. 'Documents relating to the Termination of the Occupation Régime in the Federal Republic of Germany', *Germany*, No. 1 (1955), Cmd. 9368, containing the Protocol and four conventions collectively known as 'the Bonn Conventions'.

³ Convention on Relations between the Three Powers and the Federal Republic of Germany, Articles 1 (2) and 2, *ibid.*, p. 3.

⁴ *Ibid.*, pp. 90–92.

assets and the distribution of the proceeds through the Inter-Allied Reparation Agency (I.A.R.A.); delays in executing the agreement, due partly to the inherent, technical difficulties; the emergence of the Federal Republic of Germany and the consequent impossibility of finalizing matters without reference to her; settlements between the Federal Republic and the neutral country and between the neutral country and the Three Powers.

Switzerland

The Agreement between the governments of the United Kingdom, the United States of America and France (referred to as the 'Allied Governments') on the one hand, and the Government of Switzerland (acting also on behalf of the Principality of Liechtenstein) on the other, concerning the liquidation of German Property in Switzerland, took the form of notes exchanged in Washington on 25 May 1946 setting out the following *Accord*.¹ The Allied Governments, fully recognizing Swiss sovereignty, claimed title to German property in Switzerland by reason of the capitulation of Germany and the exercise of supreme authority within Germany, and sought the return from Switzerland of gold stated to have been wrongfully taken by Germany from the occupied countries during the war and transferred to Switzerland. The Swiss Government was unable to recognize the legal basis of these claims, but desired to contribute its share to the pacification and reconstruction of Europe, including the sending of supplies to devastated areas.

Accordingly, the Swiss Compensation Office was to complete its investigations of property of every description in Switzerland owned or controlled by Germans in Germany, and of such other persons of German nationality as were to be repatriated to Germany, and to liquidate such property. The term 'property' was to include all property of every kind and description and every right or interest of whatever nature in property acquired before 1 January 1948. There were, however, special interim arrangements regarding German-owned patents, trade-marks and copyrights pending the conclusion of multilateral agreements, and property in Switzerland of the German state, including property of the *Reichsbank* and the German railroads, was excluded from the *Accord*.

'Germans in Germany' was to mean all natural persons resident in Germany, and all juridical persons constituted or having a place of business or otherwise organized in Germany, other than those organizations of whatever nature, the ownership or control of which was held by persons not of German nationality. Appropriate measures were to be taken to liquidate the interests in Switzerland, which German nationals resident in Germany had through such organizations and equally to safeguard substantial interests of non-German persons which would otherwise be liquidated.

The Swiss Compensation Office was to settle in general or particular, in consultation with a Joint Commission composed of representatives of the four Governments, the terms and conditions of sale of German property, taking into reasonable account, *inter alia*, the national interests of the signatory Governments and those of the Swiss economy. Of the proceeds of the liquidation, 50 per cent. was to accrue to the Swiss Government and 50 per cent. to be placed at the disposal of the Allied Governments for the rehabilitation of countries devastated or depleted by the war, including the sending of supplies to famine-stricken people. The Swiss Government undertook to permit

¹ *Switzerland*, No. 1 (1946), Cmd. 6884; cf. Mann, 'German Property in Switzerland', this *Year Book*, 23 (1946), p. 354; King, 'An Innovation in International Arbitral Tribunals—The Swiss-Allied Accord', *American Journal of International Law*, 46 (1952), p. 464.

the three Allied Governments to draw immediately up to 50 million Swiss francs against their share of the proceeds of liquidation. These advances were to be devoted to the rehabilitation and resettlement of non-repatriable victims of German action through the Inter-Governmental Committee on Refugees.

Germans affected by the liquidation of property under the terms of the *Accord* were to be indemnified in German money, and in each case an identical rate of exchange was to be applied. Switzerland would, out of funds available to it in Germany, furnish one half of the German money necessary for this purpose. This was to be done by debiting the credit in the name of the Swiss Government at the *Verrechnungskasse* in Berlin, but nothing in this arrangement was to be a precedent for the settlement of any Swiss claim upon Germany or to be invoked as recognition by the Allied Governments of any right on the part of Switzerland to dispose of the credit at the *Verrechnungskasse*.

The Government of Switzerland undertook to place at the disposal of the three Allied Governments the amount of 250 million Swiss francs, payable on demand in gold in New York, and the Allied Governments declared that in accepting this amount they waived, in their name and in the name of their banks of issue, all claims against the Government of Switzerland and the Swiss National Bank in connexion with gold acquired during the war from Germany by Switzerland. All questions relative to such gold would thus be regulated.

The Government of the United States would unblock Swiss assets in the U.S.A., and the Allied Governments would discontinue without delay the 'Black Lists' in so far as they concerned Switzerland.

The first difficulty in executing this *Accord* with Switzerland arose from the fact that in the initial years of the occupation the German mark was almost worthless. Switzerland regarded the provision in the *Accord* that Germans were to be indemnified in German money, one half of which was to be provided out of Swiss funds in Germany, as fundamental. She therefore claimed that until the question of a conversion rate between the mark and the Swiss franc, applicable to the sums to be paid to Germans as counterpart of the sums derived from the liquidation of property in Switzerland was settled, she was unable to proceed with the execution of the *Accord*. This difficulty was removed in 1948 when the Occupying Powers in Germany introduced their currency reform laws,¹ which made possible the establishment of a conversion rate between the Swiss franc and the *Deutschemark*.

Further difficulties arose on the Swiss side from so-called 'inter-custodial conflicts', where, particularly in the case of intangible property, two or more custodians, each applying national *situs* rules, claimed that they were entitled to liquidate the same piece of property as German property within their respective jurisdictions. The necessity of concluding bilateral agreements between Switzerland and the other countries concerned² for the resolution of such conflicts imposed further delay.

In consequence of these and other difficulties the *Accord* had still not been put into effect in 1951 when negotiations were begun for a settlement of German external debts. It then became apparent that the negotiations were likely to be rendered more difficult than they would otherwise be by the unresolved questions of Swiss claims against Germany and the liquidation of German assets in Switzerland.

Accordingly, in February 1952, the Federal Government was authorized by the Allied High Commission in Bonn and by the Tripartite Commission on German

¹ Cf. Military Government Laws, Nos. 61, 62 and 63, in *Military Government Gazette, Germany, British Zone of Control*, No. 25; Military Government Law No. 65, *ibid.*, No. 28.

² Cf. Anglo-Swiss Agreement for the Settlement of Conflicting Claims to German Assets in their respective Territories, *United Kingdom Treaty Series*, No. 50 (1953), Cmd. 8927.

External Debts in London to negotiate with Switzerland bilateral agreements on these two questions. Parallel negotiations between the Swiss Government and the Three Powers were also undertaken. The 'Agreement between the Federal Republic and Switzerland concerning Settlement of the Claims of the Swiss Confederation against the former German Reich' was signed on 22 August 1952.¹ It provided for the payment over a period by the Federal Republic of claims by Switzerland against the former German Reich to the extent of 650 million Swiss francs, leaving private Swiss claims to be dealt with in the framework of the general settlement of German external debts then under negotiation in London. An 'Agreement between the Federal Republic of Germany and Switzerland, concerning German Property in Switzerland' was also signed on 22 August 1952.² It provided that German assets in Switzerland should be released, if their total value did not exceed 10,000 Swiss francs, or if their owners made payments into a Federal German Government account in Switzerland on the following scale:

- (a) Where the assets were of a total value of between 10,000 and 15,000 Swiss francs, that part of the value which exceeded 10,000 Swiss francs.
- (b) Where the assets were of a total value greater than 15,000 Swiss francs, one third of their value.
- (c) Where the assets were attributable to Switzerland in accordance with agreements concluded by Switzerland with third governments to settle inter-custodial conflicts, half the total value.

These payments were expected to yield 121.5 million Swiss francs and the German Federal Republic undertook to pay over that sum to the Swiss Government.

In accordance with the provisions of the 'Agreement concerning German Property in Switzerland between Switzerland and the Three Powers' signed on 28 August 1952³ the Swiss Government undertook to make over the sum received from the Federal Republic, after deduction of 20 million Swiss francs advanced by Switzerland to the International Refugee Organization, to the Three Powers. On payment of this sum the obligations of all parties to the Accord of 1946 in respect to German assets in Switzerland owned by persons resident in the German Federal Republic, the western sectors of Berlin or the Saar were regarded as discharged.

Sweden

The 'Agreement between the Governments of the United Kingdom, the United States of America and France and the Government of Sweden, regarding the Liquidation of German Assets in Sweden' took the form of a series of notes exchanged in Washington on 18 July 1946,⁴ setting out the following understanding.

The Swedish Government confirmed its intention to pursue a programme of economic security by the elimination of German interests in Sweden, and that for this purpose the Swedish Foreign Capital Control Office would continue to uncover, take into control, liquidate, sell or transfer German property. 'German property' was to include all property owned or controlled, directly or indirectly, by any person or legal entity of German nationality inside Germany, or subject to repatriation to Germany, other than persons whose case merited exceptional treatment. (There were, however, special interim arrangements regarding German-owned patents, trademarks and copy-

¹ *Bundesgesetzblatt* (1953), II, p. 22.

² *Ibid.*, p. 17.

³ *United Kingdom Treaty Series*, No. 51 (1953), Cmd. 8929.

⁴ Misc. No. 12 (1947), Cmd. 7241.

rights, pending the conclusion of multilateral agreements.) The Swedish Government also undertook to identify German assets held outside Sweden by or through Swedish nationals or institutions, and to supply this information to the Allied Governments.

The disposal of the proceeds of German assets in Sweden after clearing against certain Swedish claims would leave a balance, which should be considered to be 150 million kronor. This sum of 150 million kronor was to be used for financing such purchases of essential commodities for the German economy as might be agreed between the Swedish Government and the Allied Governments for the purpose of assisting in preventing disease and unrest in Germany. In pursuance of its policy of participation in the work of reconstruction and rehabilitation, the Swedish Government would make available 50 million kronor to the Inter-Governmental Committee on Refugees for the benefit of non-repatriable victims of German action, and a further 75 million kronor, which it would allocate among the parties to the Paris Agreement on Reparation from Germany. There was to be consultation between Sweden and each of the countries which might receive credit for any part of this sum, with a view to agreement between Sweden and the country concerned, *inter alia* on the extent to which the credit might be used to reduce that country's indebtedness to Sweden.

The German owners concerned should be indemnified in German money for property liquidated or disposed of in Sweden, and the Allied authorities in Germany would take the necessary steps for the recording of the title of the German owners of property to receive the counter-value thereof.

In pursuance of its policy to restitute looted property the Swedish Government would effect restitution to the Allies of all gold acquired by Sweden and proved to have been taken by the Germans from occupied countries, including any such gold transferred by the Swedish *Riksbank* to third countries. The Allied Governments undertook to hold the Swedish Government harmless from any claims deriving from transfers from the Swedish *Riksbank* to third countries of gold to be restituted according to this declaration.

The Allied Governments would in due time require Germany or the future German Government to confirm the provisions of the understanding in so far as they affected German property in Sweden.

The representative of the Allied Governments announced that in recognition of the understanding reached, the three Governments had eliminated the 'black lists', *inter alia*, so far as Sweden or known Swedish nationals were concerned, and it was also announced that the U.S. Government would, at the earliest possible date after the coming into effect of the understanding, unblock Swedish holdings in the U.S.A.

The distribution of the 75 million kronor in accordance with the Agreement just described caused considerable difficulty. Sweden wished the distribution to be determined in the light of her own economic and financial relations with the proposed recipient countries, and this requirement was not easy to reconcile with the decisions of I.A.R.A. on the allocation of kronor, as one of several categories of reparations, among its various members. A settlement was not reached until 1956, and even then could only be reached by acquiescence in a Swedish proposal to hand over a much disputed residual sum of 7 million kronor, not to any country entitled to reparations, but to the United Nations High Commissioner for Refugees. ¶

The device of allocating 150 million kronor for essential supplies for Germany concealed disagreement between the Swedish Government, which maintained that they must pay over these monies to the Allied Governments in the latter's capacity as the Government of Germany to be used for German purposes, and the Allied Govern-

ments, who were bound by the Paris Agreement on Reparation to ensure that all proceeds of German assets from neutral countries were distributed as reparations to the countries which were parties to that Agreement. In practice the 150 million kronor were applied, within I.A.R.A., to satisfying the claims of the United Kingdom and the United States (wholly) and France (partially) to shares in the proceeds of German external assets as reparations. The funds so obtained were spent by each of the Three Powers, in lieu of monies from their own resources, on relief supplies for Germany. In due course the funds so expended were included in the claims of the Three Powers against Germany for post-war economic assistance, and provision was made for the settlement of these claims, though on a reduced scale, in the agreements of 1953.¹

The programme of liquidation of German assets in Sweden was brought to an end in 1956 in pursuance of a series of agreements between Sweden and the Federal Republic of Germany providing for the settlement of Swedish claims against German debtors, for compensation for former German owners of assets, and for the restoration of the industrial property rights of nationals of one party in the territory of the other.²

Spain

The *Accord* between the Governments of the United Kingdom and France and the United States of America, on the one hand, and the Spanish Government, on the other, for the 'Expropriation of German Enemy Property in Spain and the Liquidation of Balances and Payments between Spain and Germany', signed in Madrid on 10 May 1948,³ was preceded by an exchange of notes dated 28 October 1946, between the Government of the United Kingdom and the Spanish Government, for the 'Recognition of the Assumption by the Allied Control Council of Powers of Disposal in regard to German Enemy Assets in Spain'.⁴ The exchange of notes referred to the 'Act of Military Surrender dated 7 May 1945',⁵ and the 'Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority'⁶ (called 'the Declaration of Berlin') dated 5 June 1945 and to the assumption by the four Powers of all the powers of the German Government, as described in the Declaration of Berlin, and the agreement of the four Powers to exercise this authority through the Allied Control Council for Germany. The Spanish Government recognized the assumption of these powers by the Allied Control Council for Germany and the immediate consequences of this recognition were deemed to be the recognition of the authority of the Allied Control Council with respect to the governmental assets, whether official or quasi-official, of Germany in Spain (including its Possessions and Protectorates), and that the Allied Control Council had no less authority than any previous German Government with respect to German subjects and their property in Spain. The Government of the United Kingdom, however, guaranteed to the Spanish Government that the first Government to succeed the Allied Control Council for Germany would recognize formally the validity of all actions taken by Spain at the request of the Allied Control Council. Claims by the Spanish Government against Germany were to be given con-

¹ Cf. 'Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Germany regarding the Settlement of the United Kingdom Claim in respect of Post-war Economic Assistance to Germany', *Germany*, No. 2 (1953), Cmd. 8782.

² *Cf. Bundesgesetzblatt* (1956), II, pp. 813, 819.

³ *United Kingdom Treaty Series*, No. 71 (1948), Cmd. 7558.

⁴ *Ibid.*, No. 70 (1948), Cmd. 7535. Similar notes were exchanged between Spain and the United States and between Spain and France.

⁵ *American Journal of International Law*, 39 (1945), Supplement of Documents, pp. 169-70.

⁶ *Germany*, No. 1 (1945), Cmd. 6648.

sideration in the course of general negotiations following recognition of the Allied Control Council by Spain as the Government of Germany, and the Control Council was, after such recognition, to assume the rights and obligations incident to its status as a government. The representatives in Spain of the Allied Control Council were to be considered as the Government of Germany with respect to the registration and disposal of property of the German Government, both official and quasi-official, situated in Spain. The Spanish Government also accepted that under the Declaration of Berlin and in accordance with the *Protocol of the Proceedings of the Berlin Conference* (called 'the Declaration of Potsdam')¹ the Governments of the United Kingdom, the United States of America and the Provisional Government of the French Republic were jointly responsible for the German assets within geographical limitations in which Spain was located. Accordingly, these three Allied Governments would act as the representatives in Spain of the Allied Control Council for Germany.

The preamble to the *Accord* referred to Resolution VI of the Bretton Woods Conference and also recited the acknowledgement by the Spanish Government that the powers and authority of the Government of the German Reich had been assumed by a Representation of the Allied governments, represented in Spain, for the purposes of the *Accord*, by the Governments of the United States of America, of France and of the United Kingdom.

Articles 1, 2 and 3 provided that property of every description² situated in Spain (including its Protectorates or Possessions) on 5 May 1945 and sums falling due between that date and 30 April 1948 belonging to persons, natural or juridical, of German nationality not resident or domiciled in Spain on 5 May 1945, should be expropriated.

Under Article 8 the Government of Germany was to adopt the necessary measures for payment to the respective owners in Germany of the sums corresponding to the fair appraisal values of the expropriated property. Article 9 provided that sums in pesetas realized from the expropriation should be credited in an account to be opened in the Spanish Foreign Exchange Institute in the name of the (Allied) Representatives. Under Article 11 it was provided that as settlement of the balances between Spain and Germany, deductions should be made from the account opened in the Spanish Foreign Exchange Institute in the name of the (Allied) Representatives, on a sliding scale commencing with 20 per cent. of the first 100 million pesetas, and rising to 30 per cent. of any amount exceeding 400 million pesetas. The Spanish Government was to have the free disposition of the amounts so deducted and the remainder was to be distributed among the beneficiary Powers in the proportions determined by common agreement between the Powers signatory to the *Accord*. Amounts so distributed were, however, not to be transferred abroad or used for investment in Spain without the special agreement of the Spanish Government.

Under Article 12 the Allied Powers signatory to the *Accord* in the name of the Government of Germany, ceded to the Spanish Government all rights, titles and interests possessed or exercisable by or in the name of the German Government or its agencies over properties in Spain belonging to the National Socialist schools in eleven Spanish cities. The Spanish Government declared that the sums arising from the liquidation of this property were destined to cover its expenses in the execution of the *Accord*.

Under Article 13 both parties accepted the fulfilment of the *Accord* as the total

¹ Misc. No. 6 (1947), Cmd. 7087.

² There were special arrangements concerning trademarks, copyrights and patents; cf. *United Kingdom Treaty Series*, No. 71 (1948), Cmd. 7558, Letter No. 9 at p. 30.

liquidation of all classes of claims and trade or payments balances between Spain and Germany respectively. On the Spanish side the intention was to secure extinction of Germany's claims arising out of assistance rendered during the Civil War. The rights of persons of Spanish nationality to property in Germany or to indemnities or sums due under German law and the rights of the Spanish state to official property in Germany were not affected.

In Article 15 the Allied Powers signatory to the *Accord* confirmed, in the name of the Government of Germany, the waiver of the claims referred to in Article 13 and guaranteed the Government of Spain against any eventual or subsequent claim by former owners in Germany of expropriated property. They also undertook that Germany, or whatever German Government succeeded the Allied Control Council for Germany in the government of Germany, should confirm the provisions of the *Accord*.

A Financial Protocol laid down the proportions in which the balances in the account opened in the Spanish Foreign Exchange Institute, after deduction of the sums payable to the Spanish Government, were to be distributed among the 'beneficiary powers' i.e. the signatories of the Agreement on Reparation from Germany. The Spanish Government declared that transfers, cessions or investments of these monies would be authorized within the limits and possibilities of the Spanish economy, and the Allied Representatives accepted that principle.

In a subsequent exchange of notes the Spanish Government undertook to restitute 101.6 kilogrammes of gold taken by Germany from the Netherlands, and any additional identifiable monetary gold taken by Germany, should it be found that any such gold might have been acquired by Spain, and provided that claims were presented by 30 April 1949.

The *Accord* was, despite some technical difficulties which inevitably arose, satisfactorily executed until July 1951, when the Spanish Government refused to authorize the transfer of any further monies derived from the liquidation of German assets. This decision was largely prompted by a desire on the part of the Spanish Government to obtain from the Government of the Federal Republic of Germany the confirmation of the provisions of the *Accord* envisaged in its Article 15. The Three Powers resisted this request on the grounds that the German Federal Government could not be regarded as a government which had succeeded the Allied Control Council for Germany in the government of Germany, and that the German Federal Government did not have the attributes of sovereignty in international affairs. It became apparent when the Bonn Conventions (in their original form) were signed in 1952 that the latter objection would not long continue to be valid. The Spanish Government claimed, however, that the Federal Government's undertaking in Article 3 of Chapter VI of the Settlement Convention¹ to raise no objection to the measures taken in Spain to expropriate German assets was not an adequate safeguard and also that the authorization given to the Federal Republic to negotiate with Spain concerning compensation for former owners was inconsistent with the *Accord*. Deadlock continued until 1955, when after the entry into force of the Bonn Conventions and the consequent termination of the occupation régime in the Federal Republic it became apparent that a final settlement could only be sought in parallel Spanish-German and Spanish-Allied agreements.

These negotiations were protracted. It was not until 1958 that Spanish-German and Allied-Spanish Agreements for the discontinuation of liquidation programmes and the disposal of the proceeds of property already liquidated were signed. These Agreements have not yet entered into force.

¹ *Germany*, No. 1 (1955), Cmd. 9368 at p. 91.

Portugal

As early as 14 May 1945, the Portuguese Government, having had their attention drawn to Resolution No. VI of the Bretton Woods conference, issued a decree for the sequestration of German Assets in Portugal, and this was followed in 1949 by a series of decrees providing for the liquidation of German assets. The liquidation procedure was however complex, and rights of recourse to Portuguese tribunals were frequently invoked. Relatively little property was actually liquidated, and agreement could not be reached between the Allied Governments and the Portuguese Government on the distribution of the proceeds of liquidation. In 1953 it was recognized that, as in Spain, the ultimate solution would have to take the form of a Portuguese-German and an Allied-Portuguese settlement. Negotiations began in 1954. Agreements were concluded in 1958, but have not yet entered into force.

J. L. SIMPSON

SOME RECENT APPLICATIONS OF INTERNATIONAL LAW BY THE UNITED STATES

I. State Responsibility: Payment for Requisition of Alien Property

IN June 1958 an act of Congress¹ provided for payment by the United States to Denmark of \$5,296,302 in 'full satisfaction and settlement in connexion with the requisitioning in 1941 and the use and/or loss of 40 Danish vessels during World War II by the United States'.

The history of these Danish ships was that they were requisitioned in 1940 while lying in American ports and the United States took title to them. This title was retroactively converted² to a holding for use. At the end of the war the owners of 35 vessels negotiated settlement contracts with the United States, which were finally embodied in agreed judgments of the United States Court of Claims. The owners of the remaining five vessels failed to reach a settlement with the United States and in 1947 brought suits for compensation in the Court of Claims. Compromise judgments were entered in 1952 on the basis that a sum should be deducted from the compensation by reason of the alleged liability to seizure in prize discussed below. This did not satisfy the owners of the five vessels, and the Danish Government requested a payment over and above that specified in the judgments of 1952 on the ground that the Danish owners were entitled to the same equal treatment as regards compensation for use as American shipowners.

Both the Executive departments and the Congress had accepted the principles of equal treatment and equal compensation for use as applicable to the Danish vessels. In the case of these five ships, however, the United States had pleaded in the Court proceedings that at the time of requisitioning they were burdened by the fact that they were liable to seizure in prize by the British as enemy vessels, by reason of Germany's occupation of Denmark, and that the sum of compensation should be reduced on that account. There appears to have been some difference of opinion within the United States Government on the point, for the State Department had consistently held that

¹ Public Law 450 of 85th Congress.

² Public Law 17 of 78th Congress.

the ships were not so burdened and that, even if they were, the United States should not claim any deduction in respect of the burden, since the owners were nationals of a friendly, though enemy occupied, country.

In the final settlement the policy consideration prevailed. The five owners were granted sums equivalent to the amounts which American owners of American vessels requisitioned for war service would have received, and in the sum authorized to be paid by the act of Congress no deduction was made because of any supposed liability to seizure in prize.

To the question whether the five ships should have been regarded as burdened by liability to British seizure there does not appear to be any single answer. If any of the ships had, while lying in an American port, been sold bona fide¹ and without reservation to an American purchaser while the United States was still neutral, it would be no longer subject to seizure in prize.² However, this would not have prevented capture of the ships at sea for determination by the Prize Court of the validity of the transfer;³ and it was no doubt for this reason that the State Department advanced the second point that, although the ships would be subject to seizure, it was the British practice to requisition such ships out of the Prize Court and pay charter-hire for their use,⁴ and that there was therefore in practice no real burden.

II. *State Territory: Enclosure of Peter the Great Bay*

In August 1957 the United States protested the closing, by decree of the U.S.S.R. Council of Ministers, of Peter the Great Bay, at the head of which is the city of Vladivostok. The decree purported to extend the boundary of internal waters to a line joining the estuary of the River Tyamen-Ula and Cape Povorotny approximately 115 miles long and, at the farthest points, 20–30 miles to seaward of the former boundary. A large area of the high seas was thereby enclosed, and entry into it, or the airspace above it, required, under the decree, permission of the Soviet authorities.

In an exchange of notes⁵ the Soviet Union argued first, that the waters of Peter the Great Bay were 'historically waters of the Soviet Union by force of the special geographic conditions of that bay and its special economic and defense significance'; and that this was confirmed by Rules of Maritime Fisheries in the Territorial Waters of the Governor-Generalship of Priamurye, promulgated by the Russian Government in 1901; and, secondly, that neighbouring countries had recognized that Peter the Great Bay formed part of the internal waters of the U.S.S.R.; namely, the Chinese People's Republic, and Japan⁶ in its fisheries agreements with the U.S.S.R. of 1928 and 1941.

The United States in reply to these arguments, asserted that 'the configuration of the coast in the area . . . is not such that that body of water could in any way be regarded

¹ For example, not in order to defeat belligerent rights.

² *The Edna*, [1921] 1 A.C. 735, 740 P.C. Compare the unratified Declaration of London 1909, Article 56.

³ See McNair, *International Law Opinions*, vol. iii, pp. 353–4 (on a sale of Confederate cruiser *Sumter* to British owners in Gibraltar in 1862, the Law Officers advised that: 'With respect to the probability of the lawfulness of the Capture of the *Sumter* on the high seas by an United States Cruiser, we have to remark that her seizure for the purposes of investigation and trial in the Federal Prize Court, would certainly, in the circumstances, be justifiable and lawful.').

⁴ See *Department of State Bulletin No. 939* (24 June 1957), pp. 1020–5.

⁵ U.S. to Soviet Union (12 August 1957); Soviet Union to U.S. (7 January 1958); U.S. to Soviet Union (6 March 1957).

⁶ It appears that Japan does not accept this interpretation of the agreements.

as being comprised of landlocked waters', and that 'neither internal regulations of the Russian Government, which were not communicated to the Governments of other states, nor fishing agreements between the U.S.S.R. and Japan, could be sufficient to establish the degree of acceptance on the part of the rest of the world that would be necessary to justify the Government of the U.S.S.R. in claiming that the body of water referred to above constitutes internal waters of the Soviet Union either as an historic bay or under any other principle of international law'.¹

It may be noted that the Soviet Government did not adduce any proof of past exercise of jurisdiction over the bay, as enclosed, for example, by the exclusion of foreign vessels except on permission.

III. *State Privileges and Immunities*

1. *Franchise de l'hôtel*

On 7 December 1956 the United States Embassy in Prague addressed a note to the Czechoslovak Government, of which the substantive paragraph read:

'It has been noted for some weeks that uniformed police stationed at the entrance to the Chancery have been interfering with visitors to the Embassy, requiring them to produce identity documents, making notes from such documents and on occasion questioning them. The interference even extended to American citizens and members of other diplomatic missions in Prague attempting to enter the chancery.

'The Embassy considers this action entirely unwarranted and requests that action be taken to bring about its prompt termination.'²

The obvious purpose of this manœuvre by the Czech police was to discover the identity of those having contact with the Embassy and, if possible, the nature of their contacts. The note describes the action as 'entirely unwarranted', a choice of words which, no doubt deliberately, left open for the time being the question whether the action was unlawful.

The rule that an embassy's premises may not be entered by police or other officers of the receiving state without the express consent of the head of the mission is established beyond dispute, though it does not rest upon any principle of extraterritoriality; and the action of the Czech police might be regarded as a kind of constructive entry, a watching or besetting of the building in order to influence the actions of those inside.³

However, on the international plane, it is simplest to see the measure as a denial of the freedom of communication, which the receiving State must grant to every mission,⁴ though it may not extend as of right to communication with local nationals.⁵

¹ *Department of State Bulletin* No. 978/461 (24 March 1958).

² *Department of State Bulletin* No. 915 (7 January 1957).

³ See, for example, *Lyons & Co. v. Wilkins*, [1899] 1 Ch. 255, 267.

⁴ See *Report of International Law Commission* (Tenth Session), A/CN.4/117, p. 52: 'This freedom is to be accorded for all official purposes, whether for communications with the Government of the sending State, with officials and authorities of that Government or the nationals of the sending State, with missions and consulates of other Governments, or with international organizations.'

For the broad sense of 'communication', relevant here, see *Magdalena Steam Navigation Co. v. Martin*, 2 El. & El. 94 *per* Lord Campbell at 114: 'nor could the ambassador be safely stopped in the street to receive the writ, as he may be proceeding to the Court of our Queen, or to negotiate the affairs of his sovereign with one of her ministers.'

⁵ The International Law Commission's draft suggests that even with local nationals, there must be reasonable freedom of communication, since the functions of a mission are stated to include: 'Ascertaining by all lawful means conditions and developments in the receiving State, and report-

2. Immunity from jurisdiction

In *Arcaya v. Paéz*¹ the U.S. District Court for the Southern District of New York had to consider the distinction between consular and diplomatic status; the effect of change of status upon the jurisdiction of the court and the limitation of actions; and the effect of a State Department certificate.

Action for libel was commenced on 17 March 1956 on a letter written to the *New York Times* on 12 March 1956 by the defendant, at that time Venezuelan Consul General in New York. On 10 April 1956 the Venezuelan Ambassador wrote to the State Department saying that the defendant had written the letter complained of 'as a responsible agent of the Republic of Venezuela' and asking the Department to suggest that the suit be dismissed in view of the defendant's status. On 13 April 1956 the defendant was appointed Alternate Representative of Venezuela to the United Nations with rank of Envoy Extraordinary and Minister Plenipotentiary, and the State Department accordingly issued an identity card to him stating that he was entitled to the privileges and immunities of diplomatic envoys. At the hearing of the motion to dismiss the suit, the Ambassador's letter of 10 April 1956 was presented to the court by the State Department, through the United States Attorney, without comment. The State Department also commented by letter of 17 September 1956 on certain issues raised by the Court.

The Court held that jurisdiction was obtained over the suit at the commencement of the action² and before the defendant's appointment to the Venezuelan Delegation to the United Nations; that, while a consul is immune only from suits arising on actions by him within the scope of his official authority, his authority may be specially enlarged by his government, if it is so 'recognized by the government within whose dominions he assumes to exercise it';³ but that no such enlargement could be accepted in the instant case, given the State Department's silence on the point, and there was nothing to show on the face of it that the letter complained of was written within the scope of the defendant's authority. The State Department had in its letter of 17 September 1956 expressed the opinion that the defendant's change of status did not oust the jurisdiction of the Court; but the Court held that it was bound to examine and decide this question independently; it held that the change of status from that of consul general to that of diplomatic envoy did not oust the jurisdiction of the Court, once validly obtained;⁴ further, the plaintiff by lawful service of summons in the action had obtained two valuable rights which should not be taken away on account of the defendant's promotion: (a) the right to resume the action at a later time without fresh service of the writ; and (b) the right to have the action treated as begun on the date of the original writ and to resume it regardless of the lapse of the period fixed by law for beginning a libel action.

In the result, the Court stayed the action for such time only as the defendant retained his status as Alternate Representative of Venezuela to the United Nations.

ing thereon to the Government of the sending State: Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.'

¹ [1956] 145 F. Supp. 464.

² *United States Code*, Title 28, S. 1351 gives jurisdiction over suits against consuls to the District Courts.

³ *The Anne*, 3 Wheaton 435, 445, per Story J.

⁴ Relying on *Phelps v. Oaks*, 117 U.S. 236, 240, where the Supreme Court said: 'Much less can the plaintiff's right to prosecute his action in the courts of the United States, once vested, be defeated by imposing upon him an adversary against whom he cannot maintain the jurisdiction of these tribunals'; and *Earle v. de Besa*, 109 Calif. Appeals 619 (alien defendant appointed consul general before conclusion of action validly commenced: motion to dismiss denied).

IV. *Treaties*1. *The nature of reservations*

The *Treaty between the United States and Canada concerning uses of the Waters of the Niagara River*¹ defines the quantity of water in the Niagara River to be available for power uses and provides that it 'shall be divided equally between the United States and Canada'. In sending the Treaty to the Senate for its advice and consent, the President observed of the United States's use of the waters:

'It is a question which we in the United States must settle under our own procedures and laws. It would not be appropriate either for this country or for Canada to require that an international agreement between them contain the solution of what is entirely a domestic problem.'

It was the sense of the Senate that, while the mode of use of the United States's share of the river water was a 'domestic' question concerning 'the United States constitutional process alone', this should not be left to be governed by the existing Federal Power Act, but reserved to Congress for future action. The Senate, therefore, in consenting to ratification, caused the following reservation to be inserted in the Treaty:²

'The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States share of the waters of the Niagara River made available by the provisions of the Treaty, and no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress.'

Meanwhile the Canadian Parliament had approved the Treaty as signed, without the reservation.

On 17 August the State Department called the attention of the Canadian Government to the reservation and explained its purpose, and, before any reply came from Canada, the President ratified the Treaty in its new form. On 21 September the Canadian Government declared its acceptance of the reservation and ratified the Treaty without resubmission to Parliament. In the Protocol of Exchange of Ratifications, Canada inserted the following statement:

'Canada accepts the above-mentioned reservation because its provisions relate only to the internal application of the Treaty within the United States and do not affect Canada's right or obligations under the Treaty.'

In 1956 the New York State Power Authority applied to the Federal Power Commission for a licence to construct a power system, which would make use of all the water available to the United States under the Treaty. The Commission decided that it had no authority to grant the licence sought, on the ground that the reservation in the Treaty removed the Niagara River waters from the reach of the Federal Power Act, under which alone it could act. It said:

'Since the reservation here was intended by the Senate as part of the treaty and was intended to prevent our jurisdiction attaching to the water made available by the treaty, it is entirely authoritative with us as the Supreme Law of the Land under Article VI of the Constitution.'

¹ Signed on 27 February 1950: 1, *U.S. Treaties*, 694.

² 9 August 1950: 96, *Congressional Record*, 12095.

The New York State Power Authority petitioned for a review and the Circuit Court of Appeals held¹ that the reservation was not supreme law of the land as part of the Treaty and, therefore, since the Federal Power Commission was not precluded thereby from issuing the licence sought, remanded the case to the Commission. On 18 November 1957 the Supreme Court set the judgment aside, on grounds however which did not involve any reconsideration of the law.

The judgment of the majority of the Court of Appeals made clear the distinction between the international and domestic functions of a reservation, saying:

'A true reservation which becomes a part of a treaty is one which alters "the effect of the treaty in so far as it may apply in the relations of the State with the other State or States"'² parties to the treaty.'

The purpose of the Senate's reservation was simply to reserve the right to provide by act of Congress for the use of the United States's share of the Niagara waters: the reservation did not, and was not intended to, change any term of the agreement between the United States and Canada and did not constitute a counter offer to Canada. It was not therefore an operative part of the treaty between the United States and Canada and its function was wholly domestic.

Bastian J. dissented, adopting a broader, but it is believed inadequate, test of what is of international or domestic concern:

'It is not required as a condition to validity that the reservation be in and of itself, treated in artificial isolation or detachment, a domestic matter properly a subject of contract between sovereigns. It is sufficient if it is directly related to a general subject which is properly a matter for contract between sovereigns, and if international policies and considerations are the *raison d'être* of the reservation.'

He adduced, as reasons for regarding the reservation as satisfying this condition of validity, a Canadian interest in speedy ratification because of Canada's acute power shortage and the possibility that delay might drive her to unilateral action in exploiting the Niagara waters.

Two comments may be made on the views expressed by Bastian J. First, that language describing a reservation as directly, properly or essentially related to the subject-matter of a treaty is too vague and indeterminate. In the present case, even if the insertion of the reservation procured an early ratification by the United States and even if this, being in the Canadian interest, was of international concern, that fact would still not make the content of the reservation an operative term in the Treaty. Secondly, since no act of Congress, providing for the use and development of the United States's share of the waters, could modify in any way Canadian rights under the treaty,³ *a fortiori* a reservation of the right of Congress so to legislate could not touch them.

2. The effects of war

In *Argento v. Horn*⁴ the main question at issue was whether the Extradition Treaty between the United States and Italy⁵ had been abrogated by the state of war declared

¹ [1957] 247 F. 2d 538.

² Quoted from *Harvard Research* (supplement to *American Journal of International Law*, 29 (1935), pp. 843, 857).

³ See *Greco-Bulgarian Communities, P.C.I.J.*, 1930, Series B 17, p. 32: 'It is a generally accepted principle of international law that in the relations between Powers, which are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.'

⁴ [1957] 241 F. 2d 258: U.S. Circuit Court of Appeals.

⁵ 1868; amended in 1869 and 1885. On 6 February 1948 the U.S. Secretary of State notified

between the countries on 11 December 1941. In 1931 the appellant had been convicted *in absentia* in Italy, and sentenced to life imprisonment for a murder committed there in 1922. Upon application of the Republic of Italy, extradition proceedings were started against him in 1955 and his arrest, pending surrender to Italy, was upheld by the competent U.S. District Court on a writ of habeas corpus. He appealed, pleading abrogation of the Extradition Treaty. It was conceded that, failing the Treaty, he could not be seized or surrendered to Italy as a fugitive criminal; and that, if the Treaty had been abrogated by the outbreak of war, it was not revived by the notification of February 1948, since this had not been submitted to the U.S. Senate for its advice and consent.

The Court starting from the position that not all treaties are automatically abrogated by the outbreak of war between the parties, found no judicial authority to determine on which side of the line an extradition treaty falls, and held that this question

'can and must be decided against the background of the actual conduct of the two nations involved, acting through the political branches of their governments';

and that

'notification by our State Department with regard to the extradition treaty, and the conduct of the political departments of the two nations in the ensuing nine years, evidencing their unqualified understanding that the extradition treaty is in full force and effect, all make it obvious that the political departments of the two governments considered the extradition treaty not abrogated but merely suspended during hostilities.'

The Court came to the conclusion, reluctantly in face of the appellant's long and law-abiding residence in the United States, that the Treaty was in force and affirmed the judgment below.

The Court relied in effect upon the construction put upon the Treaty by the parties,¹ as evidenced by their conduct, rather than upon the purpose and contents of the treaty; though it is probable² that, had the Court found it necessary, it would have had regard to the latter rather than to the intention³ of the parties and could have still found that the Treaty had not been abrogated.

British practice contains little precedent⁴ and while the United Kingdom notified⁵ Finland, Hungary, Italy and Roumania that its pre-war extradition treaties were to be regarded as in force from 6 April 1948, it did not do so in the case of Austria and Germany. It is to be assumed that the extradition treaties between the United Kingdom and these countries are not at present operative. The general conclusion, which may be drawn, is that extradition treaties are suspended by outbreak of war between the parties and become operative again only through formal act of the parties.

Italy under Article 44 of the Italian Peace Treaty 1947, that it desired to keep in force or revive, among others, the Extradition Treaty 1868, as amended. It does not, however, appear to have been registered with the United Nations as required by Article 44 (a) of the Peace Treaty.

¹ Citing *Terlinden v. Ames*, 184 U.S. 270: 'A construction of a treaty by the political department of the Government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight.'

² The Court said *obiter*: 'If the question were to be decided in a vacuum, the conclusion could only be that it is extremely doubtful that war ipso facto abrogates a treaty of extradition.'

³ Suggested as the test by Sir Cecil Hurst: 'The Effect of War on Treaties', this *Year Book*, 1 (1921-2), pp. 37-47.

⁴ McNair, *Law of Treaties* (1938), pp. 543-5, 549.

⁵ Under the applicable provisions of the Peace Treaties.

3. *Political crimes in extradition treaties*

In *Karadzole v. Artukovic*¹ a Circuit Court of Appeals had to consider a request by the Yugoslav Government for the extradition of a Yugoslav national, who as 'Minister of the Interior' in a Croatian cabinet formed in 1941, when the lawful government of Yugoslavia was in exile, had, it was alleged, 'ordered' numerous murders.

The court below had found that, at the time of the alleged murders, several political factions were struggling for power in Croatia. The respondent was engaged in this struggle.

The Court of Appeals cited *In re Castioni*² and applied the test, formulated by Hawkins J., of whether the crime was 'incidental to and formed part of political disturbances'. It held that the acts alleged against the respondent met this test and were political offences within the meaning of the U.S.-Yugoslav Extradition Treaty,³ that their designation as 'war crimes' did not derogate from their political character; and that the United Nations General Assembly resolution⁴ on war criminals could not have the effect of modifying the Treaty provisions, though the Court added, 'perhaps changes should be made as to such treaties'.

The concept of a political offence certainly comprises acts aimed at a change of government or of the form of government, but it is doubtful whether a 'war crime', being an offence against international law, falls properly within extradition treaty exceptions for political offences. The facts of the case do not emerge from the report clearly enough to show whether the acts alleged against the respondent would have constituted war crimes or not; but if a *prima facie* case were established, it is suggested that the exception for political offences in the extradition treaty should not be allowed to operate, because a crime against humanity or the rules of war is of international concern and should not be protected because it happens to have a national political objective.⁵

J. E. S. FAWCETT

THE HEADQUARTERS AGREEMENT OF THE INTERNATIONAL
ATOMIC ENERGY AGENCY OF 1 MARCH 1958 AT VIENNA⁶

THE Headquarters Agreement of the International Atomic Energy Agency in Vienna reflects the present complexity of the privileges and immunities of United Nations organizations and is of special interest, since in some respects it goes beyond contemporary practice and perhaps points the way to further developments in the privileges and immunities of international organizations. The outstanding provision, as we shall

¹ Reported in *U.S. Law Week*, 26 (June 1957), p. 2030.

² [1892] 1 QB. 149.

³ 1901, Article VI: 'A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded be of a political character. . .'

⁴ Providing for the surrender of war criminals: 13 February 1946; 15 December 1946; 31 October 1947 (*Journal of the General Assembly*, First Session, First Part, p. 661; Second Part, p. 880, *Official Records*, Second Session, p. 102).

⁵ Sir Hersch Lauterpacht, *Law of Nations and Punishment of War Criminals*; this *Year Book*, 21 (1944), p. 91: 'Acts which *per se* constitute common crimes and which are contrary to the rules of war cannot legitimately be assimilated to political offences.'

⁶ This note is based upon my paper entitled 'I.A.E.A.: Choice of Location and Headquarters Agreement' delivered to a seminar recently conducted at Columbia by Professors Leland Goodrich and Wolfgang Friedmann. Professor Oliver Lissitzyn kindly gave advice during the preparation of the note, but the present writer alone bears the responsibility for the views here expressed.

see, is that which extends international privileges and immunities to the representatives of certain non-governmental organizations accredited to the Agency.

The text is lengthy and reflects the Anglo-American drafting tradition rather than the terser style found in the comparable provisions of the European Coal and Steel Community. The full title of the Agreement is 'Agreement Between the International Atomic Energy Agency and the Republic of Austria Regarding the Headquarters of the International Atomic Energy Agency' (code number GC1(s)-COM.2-13).

The I.A.E.A. has not been identified as a specialized agency and it differs from a specialized agency at least in respect of its manner of reporting to the United Nations. Unlike them, the I.A.E.A. reports to the Security Council, not to the General Assembly. Apart from this point, however, the Agency is really to be considered as another specialized agency. Consequently it is scarcely a matter of surprise to find that the general pattern of its Headquarters Agreement follows that of the Convention on the Privileges and Immunities of the Specialized Agencies which was adopted by the General Assembly on 21 November 1947 and which subsequently influenced other headquarters agreements like that of I.C.A.O. (Doc. No. 7147, 1951). The I.A.E.A. headquarters agreement shares many articles with the headquarters agreements of I.C.A.O. and of other organizations. Other phrases reflect the headquarters agreement of the United Nations itself, a fact which may partly be explained by the participation in the negotiation of the I.A.E.A. Agreement of American experts acquainted with the working of the New York Agreement.

Of the fifty-two sections of the I.A.E.A. Agreement we will only consider those which are of special importance for the development of international privileges and immunities. Section 42 states that:

'... representatives of organizations with which the organization has established relations pursuant to Article XVI A of its Statute or of organizations invited by the Board of Governors or the General Conference to the headquarters seat on official business shall enjoy, within and with respect to the Republic of Austria, the following privileges and immunities so far as may be necessary for the effective exercise of their functions and during their journeys in connection with service on such missions, committees or other subsidiary bodies, and during attendance at the headquarters seat and at such meetings:

(a) Immunity in respect of themselves, their spouses and their dependent children, from personal arrest or detention or from seizure of their personal and official baggage;
(b) Immunity from legal process of any kind with respect to words spoken or written, and all acts done by them in the performance of their official functions . . . ;

(c) Inviolability for all papers . . . ;

(d) The right for the purpose of all communications with the I.A.E.A. to use codes . . . ;

(e) Exemption with respect to themselves and their spouses from immigration restrictions . . . ;

(f) The same protection and repatriation . . . ;

(g) The same privileges with respect to currency . . . ;

(h) The same immunities and facilities with respect to their personal and official baggage as the Government accords to members, having comparable rank, of the staffs of chiefs of diplomatic missions accredited to the Republic of Austria.'

Elsewhere in the Agreement extensive privileges and immunities are granted with respect to governors, representatives, officials, and experts attached to I.A.E.A. In the above section, however, the Agreement extends privileges and immunities also to the representatives of certain non-governmental organizations. Needless to say, the kind of non-governmental organization so accredited will be, as Article XVI A of the Statute¹

¹ Statute of the I.A.E.A., I.A.E.A.-CS-13, 1956.

implies, of the highest importance and will probably be of the nature of a public corporation. Josef Esser, Legal Adviser in the I.A.E.A., has stated by letter that 'as a matter of fact the Agency will establish with most of the non-governmental organizations a non-formal relationship by mere administrative arrangements without consulting the Board of Governors in order to prevent any automatic grant of privileges and immunities to their representatives coming to Austria on official business'. Nevertheless, the principle involved is most important and, in its explicit and far-reaching character, quite unprecedented.¹ The Workers' and Employers' members and deputy members of the Governing Body of the International Labour Organization differ in that they are appointed by their governments and do not represent non-governmental organizations as such.²

Section 48 (d) states that the agreement shall apply whether the Government maintains or does not maintain diplomatic relations with the State of the representative concerned. On the other hand, the comparable provision in the headquarters agreement of the United Nations (Section 14)³ confines such representatives to the immediate vicinity of the headquarters. The Convention on the Privileges and Immunities of the Specialized Agencies has no provision comparable to that of the I.A.E.A. on this point.

Section 48 (c) extends the provisions of the Agreement to Austrian citizens and stateless persons resident in Austria 'to the extent recognized by international law as accepted by the Government'. Whether 'international law as accepted by the Government' proves to be more liberal than American practice with regard to American members of the United Nations Secretariat remains to be seen.

Sections 5 and 6 make provision for the establishment of research facilities within and outside the headquarters seat and such facilities, by agreement, would come under the terms of the Agreement itself. Section 46 contains the seemingly unnecessary statement that the Government does not incur any responsibility for the acts of the Agency. These sections reflect the special nature of the Agency as one dealing with nuclear activities. Presumably Section 46 was included with an eye to the possibly far-reaching effects of any mistakes made in the course of nuclear research should the Agency establish such facilities.

In many cases the Agreement elaborates rights which other organizations also claim to enjoy, though on the authority of less specific provisions. It defines in great detail rights which in other organizations are only assumed to exist. Section 22 lays down with clarity the rules for the return of indirect taxes to the Agency, as well as the non-direct tax rights of the Agency. Section 15 gives the Agency immunity from censorship and the right to use codes. The United Nations agreement has no fully comparable provision. Section 18 of the I.A.E.A. Agreement provides that radio broadcasting by the Agency is not subject to censorship. Section 33 grants privileges and immunities to representatives (other than 'resident representatives' who are provided for elsewhere) at meetings convened by the I.A.E.A., i.e. temporary or *ad hoc* representatives of Member States. Section 29 confers on 'Permanent Missions' the same status as embassies.

¹ Representatives of non-governmental organizations at the United Nations have only limited advantages over private visitors. Yuen-Li Liang and Kwen Chen, 'The question of access to the United Nations headquarters of representatives of non-governmental organizations in consultative status', *American Journal of International Law*, 48 (1954), pp. 434-50.

² Martin Hill, *Privileges and Immunities of International Officials: The Experience of the League of Nations* (Washington 1947). Günther Jaenicke, 'Die Arbeitnehmer- und Arbeitgebervertreter in der Internationalen Arbeitsorganisation', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 14 (1951-2), at p. 72.

³ See reservations in U.S. Public Law 357, 80th Congress.

Section 17 grants the Agency the right to convene meetings not only within the headquarters seat but also anywhere else in Austria as approved by the Government. Besides providing for the entry into Austria of representatives, press, &c., Section 27 also specifies a right of sojourn. Mention of a right of sojourn can be very important for members of the press. There is no specific mention of such a right in the comparable section (Section 11) of the United Nations headquarters agreement. Section 27 also provides for entry and non-expulsion despite acts which, though repugnant to Austria, are of an official character with respect to the I.A.E.A. This provision applies to a wide range of persons from governors of the Agency down to the representatives of non-governmental organizations invited to the Agency and identified to the Government by the Director General. The list of persons provided for includes accredited representatives of all press media so long as those persons were accredited by the Agency in consultation with the Government. While members of the press are similarly accredited at the United Nations there is no provision in the United Nations agreement comparable to that of Section 27 in the I.A.E.A. agreement. Section 51 establishes the machinery of an arbitral tribunal of three to settle disputes arising out of the Agreement. Section 51 states that the Agency shall provide means for the settlement of contract and private law disputes to which the Agency is a party as well as for cases in which the Agency does not choose to waive the immunity of an official. Section 7 refers to the 'extra-territoriality' of the seat and Section 9 covers the powers of the Agency to govern the headquarters seat. The term 'extra-territoriality' may be construed as the term is construed in Swiss practice. In view of the unwillingness of certain governments to grant full recognition to the United Nations *laissez-passer* it is interesting to note that Section 45 accepts these as 'valid travel documents'.

Other sections cover such matters as the non-waiver of immunity with respect to execution (Section 19), police protection (Section 10), the inclusion of temporary buildings within the seat (Section 2b), favourable rates for communications and services (Sections 12, 13, 14), and the admission of visitors (Section 28).

Despite the attempt to be specific evidenced throughout the Agreement there are, as we have seen in Section 48 (c) and elsewhere, a number of matters which have been left open to possible dispute or to unilateral interpretation. Section 48 (c) falls into the latter category. Section 34 falls into the former, since it grants clerical personnel attached to a delegation the same privileges and immunities accorded to the clerical personnel of diplomatic missions, a status very much open to dispute at the present time.

In general, the provisions of the Agreement are highly favourable to the Agency. As is stated in Section 52, the Agreement should '... be construed in the light of its primary purpose to enable the I.A.E.A. ... to fulfil its purposes'. Nevertheless, as is only reasonable, certain provisions are designed to protect Austria. Section 47 states that the Agency shall co-operate with the Government to avoid prejudice to the security of Austria and Section 48 requires the Agency to establish rules designed to prevent the abuse of privileges.

It may well be asked why Austria was so willing to extend such far-reaching concessions. The answer lies partly in the desire of Austria to see the I.A.E.A. located in Vienna. Another factor was the willingness of the negotiators to establish specific rules and thus, by precedent, to foster the clarification and development of international privileges and immunities. This favourable attitude is also reflected in Section 49 (c), which provides that Austria shall extend to the Agency any more favourable provisions that it may subsequently grant to any other inter-governmental organizations. This

provision, in effect a 'most-favoured organization' clause, is a very unusual one in this field and is worthy of attention.

The net result of the Agreement is that the I. A. E. A., with respect to its headquarters, has more power than any other United Nations organization, including the United Nations itself. Illustrative of this is the position of the Director General of the I. A. E. A. in Austria compared with that of the Secretary General of the United Nations when in the United States. Section 39 of the Agreement accords the Director General privileges and immunities equal to those of ambassadors who are heads-of-missions, while the failure of the United States to accede to the Convention on the Privileges and Immunities of the United Nations has placed the Secretary General in a less favourable position. By Section 15 of the United States-United Nations agreement the Secretary General is to be consulted as to who should receive the privileges and immunities accorded to representatives, while he himself does not receive those fuller privileges and immunities!

Since the primary interest of the I. A. E. A. Agreement lies in the special contributions which it makes to the development of international privileges and immunities, it has not been thought useful in this note to deal with its other provisions, important though these may be to the Agency, covering such matters as legal personality and the status of State representatives. In these matters, as in those discussed, the tendency is to specific and detailed formulation, but the content does not exceed the general practice as found in similar agreements.¹

RAYMOND SPENCER RODGERS

¹ R. S. Rodgers, 'Consultative Status with the I. A. E. A.', *International Associations* (Union of International Associations. Brussels, February 1959).

DECISIONS OF BRITISH COURTS DURING 1957-8 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

A. PUBLIC INTERNATIONAL LAW

British nationality—Lineal descendant of the Electress Sophia

Case No. 1. *Attorney-General v. Prince Ernest Augustus of Hanover*, [1957] A.C. 436 is of great importance to those interested in the English rules for the interpretation of Statutes; it is also of some interest to those concerned with the law of British nationality, but is of less interest to students of general international law. The decisions of the courts below were reported *sub nom. Prince Ernest of Hanover v. Attorney-General*, [1955] Ch. 440 and [1956] Ch. 188, and were discussed in these Notes in this *Year Book*, 32 (1955-6), p. 308. The decision of the House of Lords may therefore be noticed here more briefly.

Prince Ernest, a descendant of the Electress Sophia, sought a declaration that he was a British subject. He relied on an Act of 1705, the material part of which was in the following terms: 'The said Princess' (sc. the Electress Sophia), 'and the issue of Her Body and all Persons lineally descending from Her, born or hereafter to be born, be and shall be, to all Intents and Purposes whatsoever, deemed, taken and esteemed natural-born Subjects of this Kingdom, as if the said Princess, and the Issue of Her Body, and all Persons lineally descending from Her, born or hereafter to be born, had been born within this Realm of England. . . .' He contended that he was a British subject under this provision and section 12 of the British Nationality Act, 1948, and he claimed a declaration to that effect. The Act of 1705 had been repealed by the latter Act but not so as to affect his status. Vaisey J. refused to grant the declaration but the Court of Appeal (Lord Evershed M.R., Birkett and Romer L.JJ.) reversed his decision.

The House of Lords (Viscount Simonds, Lord Normand, Lord Morton, Lord Tucker and Lord Somervell) unanimously dismissed the appeal. They rejected the contention of the Attorney-General that the Act of 1705 applied only to the descendants born in the lifetime of the Electress Sophia. This contention was supported by various arguments, namely, the wording of a previous statute, the Act 4 Anne c. 1, which clearly was so limited, the fact that another Act was passed in 1763 to naturalize an individual descendant, the inconvenience arising from the operation indefinitely of the Act of 1705, and the wording of the preamble to the Act of 1705, which was the principal argument advanced. The material part of the preamble was as follows: '... to the End the said Princess Sophia . . . and the Issue of Her Body and all Persons lineally descending from Her, may be encouraged to become acquainted with the Laws and Constitutions of this Realm, it is just and highly reasonable that they, in Your Majesty's Life Time (whom God long preserve) should be naturalised, and be deemed, taken and esteemed natural born Subjects of England. . . .' All these arguments were rejected by their Lordships; the argument from inconvenience was rejected because any inconvenience arose not from the terms of the Act but from the length of time during which it had run; the argument from the wording of the preamble was rejected on the grounds that it was itself ambiguous, and that the enacting words could be intended to go wider than the preamble, and their literal wording could not be cut down by the terms of the preamble, even if that itself had been unambiguous. The Attorney-General refused to take the point that the English Act of 1705 could not take effect after the Act of Union, 1706, and the House therefore expressed no opinion on it.

The technicalities of the point of construction are of small interest to international lawyers, but the decision of the International Court of Justice in the *Nottebohm* case

(Second Phase), *I.C.J. Reports*, 1955, p. 4, prompts the inquiry whether, if the doctrine in that decision is accepted, a foreign state is obliged to acknowledge the right of diplomatic protection by Her Majesty's Government of a person who acquired British nationality only by virtue of the Act of 1705, assuming that he had no other nationality. The decision of the International Court dealt with a case of naturalization but it referred frequently to nationality, and therefore, may have some application to the conferment of nationality by birth. Presumably, in view of the widespread existence of *jus sanguinis* systems of nationality, a child of a national has a sufficient link with the country of his parent's nationality to satisfy the tests in the *Nottebohm* case. But the Act of 1705 also provided that, if a person within the Act 'shall become a Papist or profess the Popish Religion', he 'shall not enjoy any Benefit or Advantage of a natural born Subject of England; but every such Person shall be adjudged and taken as an Alien . . .'. This could operate so that after several generations of persons professing 'the Popish Religion', a descendant, not of those beliefs, could claim British nationality; and it might be that a claim to nationality based on descent at several removes from a British subject would be distinguishable from the ordinary system of *jus sanguinis*. However, the Act has been repealed, the case is unlikely to arise, and further speculation seems unprofitable.

State immunity—Conflicting claims to bank account in High Commissioner's name

Case No. 2. The House of Lords in *Rahimtoola v. Nizam of Hyderabad and Another*, [1958] A.C. 379, reversed the decision of the Court of Appeal in *Nizam of Hyderabad and State of Hyderabad v. Jung and Others*, [1957] Ch. 185, which was discussed in these Notes in this *Year Book*, 33 (1957), pp. 326-8; the facts may therefore be set out more briefly here. A sum of money, the property of the Nizam, in his account at the Westminster Bank, was transferred to Rahimtoola, then the High Commissioner of Pakistan in London, who received it on the instructions of his Foreign Minister, the transfer being made, as it transpired in evidence, without the Nizam's actual instructions but by persons authorized to operate his account. The Nizam claimed to recover the money from Rahimtoola and the Westminster Bank, and the claim was opposed on the ground that it could not be adjudicated in the courts since to do so would implead the sovereign State of Pakistan. Rahimtoola moved accordingly that the writ be set aside while the Bank claimed that the action be stayed as against itself. Upjohn J. made the order which was sought, but the Court of Appeal (Lord Evershed M.R., Birkett and Romer L.J.J.) allowed an appeal against his order.

The House of Lords, in turn, unanimously reversed the decision of the Court of Appeal and allowed the appeal. Viscount Simonds, Lord Reid and Lord Cohen delivered opinions covering the whole case; Lord Somervell of Harrow concurred in the opinion of Lord Reid, adding only a few words of comment on the decision in *Haile Selassie v. Cable and Wireless Limited*, [1938] Ch. 839; Lord Denning delivered an opinion also allowing the appeal which, however, proceeded on a different basis from the rest of their Lordships, who all expressly stated that they were not to be taken as concurring in the views expressed by Lord Denning. It is convenient therefore to treat his opinion separately from the others.

The three full opinions, those of Viscount Simonds, Lord Reid and Lord Cohen are considered together in the next five paragraphs. They clearly regarded the general outline of the law as well settled, citing *United States of America and Republic of France v. Dollfus Mieg et Cie. S.A.*, [1952] A.C. 582, as the governing authority. Lord Cohen regarded the effect of that case as correctly stated by the Court of Appeal in the judgment of Lord Evershed M.R., and Birkett L.J. reported in [1957] Ch. at pp. 233-4:

'From this passage it sufficiently appears, in our judgment, that the prohibition, which is of the essence of the rule, is a prohibition against the assertion by the English court of jurisdiction to entertain proceedings against a sovereign who (or a sovereign State which) is unwilling to submit to such jurisdiction. Whenever, therefore, the rule is invoked in a proceeding to which the sovereign is not made or sought to be made a

party, but in which the subject-matter is some property in regard to which the sovereign has or claims some kind of right or interest, the applicability of the rule depends upon the extent to which the prosecution of the claim so affects the right or interest of the sovereign "as to amount in one way or another to a suit against the sovereign". The proposition is imprecise, no doubt; but as Lord Radcliffe observed, the law cannot be set at rest "by any neat combination of words".

The difference of opinion between their Lordships and the Court of Appeal lay in their application of the rule to the particular facts of the case.

A question raised already in the Courts below which was considered by their Lordships was whether the High Commissioner was an 'organ' or '*alter ego*' to be identified with the State of Pakistan so that an action against him amounted to impleading his sovereign in the same way as suing a Department of State by name. Viscount Simonds thought that he was not so identified while Lord Cohen thought he was; Lord Reid declined to decide the question; but all three were content to deal with the case on the footing that he should be treated only as an agent, since, in their opinion, even in that capacity, he was entitled to the immunity claimed.

The central question was whether the interest which Pakistan could claim in the sum through its agent sufficed to bring the rule into play. Their Lordships emphasized that the State of Pakistan could sue the Bank to recover the sum, either in the agent's name, or in its own, adding him as defendant. This they regarded as a sufficient right or interest to bring the rule of immunity into play. Viscount Simonds (at p. 395) said that this right to sue the bank placed the sum in its 'possession or control' which he regarded as a proper description of the 'relation in which an owner stands to the property which he owns'. Lord Reid (at p. 400) considered that in virtue of the right to sue the bank Pakistan had a 'legal title' and 'full control of this chose in action'. Lord Cohen (at p. 407) considered that 'in the case of a chose in action the question is, no doubt, one of title, not control' but considered that Pakistan had a sufficient title to make any suit against Rahimtoola to recover the balance a suit against a sovereign state. Lord Reid (at p. 403) also said, adopting words from *Juan Ysmael and Co. Inc. v. Indonesian Government*, [1955] A.C. 72: 'The fact that Pakistan does not claim a beneficial interest in the debt does not, in my view, make its claim merely illusory or its title manifestly defective.' Their Lordships, therefore, regarded the legal title traceable through the agent as a sufficient interest.

The argument based on *Buller v. Harrison* (1777), 2 Cowp. 565, which was accepted by the Court of Appeal they unanimously rejected. It will be recalled that this point rested on the rule that, where a payment is made to an agent either under a mistake of fact or wrongfully, it is recoverable from him, until he has paid or accounted for it to his principal. Their Lordships pointed out that the line of cases to which *Buller v. Harrison* belonged had never involved a sovereign. Viscount Simonds (at p. 397) evidently considered that the existence of a mistake or wrongful payment was a vital issue in the litigation but the sovereign was entitled to refuse to enter into that litigation. Lord Cohen did not expressly deal with the point except that his opinion suggests that he considered that this rule must give way to the rule in *Dollfus Mieg*, and his view, therefore, seems to have been similar to that of Viscount Simonds. Lord Reid suggested (at p. 401) that *Buller v. Harrison* did not apply since under the rule it was necessary to sue the principal, i.e. the Government of Pakistan, which was impossible in the present case. This argument is less satisfactory since this type of action is allowed even without the joinder of the principal, see *Admiralty Commissioners v. National Provincial Bank* (1922), 127 L.T. 452, which so decided.

Their Lordships appeared from their opinions to be much influenced by a reluctance to introduce subtle distinctions in this field, whether between money in the name of a government and money in the name of an agent for a government or between a debt and ordinary chattels such as the gold bars which were the subject of the claims in *Dollfus Mieg*.

Once it was decided that Rahimtoola was entitled to immunity, Viscount Simonds had little difficulty in deciding that the Bank was also entitled to the stay of proceedings which

they sought, on the ground that the action against the Bank interfered with the legal title of Pakistan as much as did an action against Rahimtoola. Lord Reid and Lord Cohen rested their opinion on this point firmly on the *Dollfus Mieg* case, which they considered to apply equally when the subject was a debt, and not chattels.

The opinion of Lord Denning is long and interesting. However, the other opinions all contained an express reference to it in which their Lordships stated that they must not be regarded as assenting to Lord Denning's views and this must necessarily reduce the value of his opinion for the future. Lord Denning asked first to which person the debt was transferred and argued that the legal title was in Rahimtoola and that Pakistan could not sue to recover it. He also agreed with the Court of Appeal that the Nizam's title was better than that of Pakistan, but that such questions were part of the argument which a plea of sovereignty might prevent. He found it impossible to tell what degree of interest was required to be shown for a claim of immunity or what criterion determined whether a separate person or entity is an 'organ or *alter ego*' of the State. He thought immunity should not depend on technical rules in domestic law, and that the English decisions were inconsistent. But, if it were relevant, he preferred the decision of the House of Lords in the *Dollfus Mieg* case on the thirteen bars, that is, those bars with which the Bank of England had parted, where immunity was not granted, and also the decisions in Chancery cases such as the *Duke of Brunswick v. King of Hanover* (1844), 6 Beav. 1. In his view, however, this was irrelevant; immunity should depend on what was 'the nature of the dispute. Not on whether "conflicting rights have to be decided" but on the nature of the conflict'. The criterion should be whether the legislative, executive or international actions of the foreign government are brought into question or it is commercial transactions which give rise to a dispute within the territorial jurisdiction of the court. In the latter case immunity should not be granted. This principle accorded with both counts of the decision in the *Dollfus Mieg* case. Applying this principle he regarded the present case, as Upjohn J. had said, as concerning an international transaction and for this reason he would allow the appeal. Lord Denning in his final words urged the House to reconsider on principle this branch of the law.

Their Lordships impliedly gave their comments on Lord Denning's views by refusing to assent to them. It may be doubted whether even the House of Lords could properly redirect the law into the channel preferred by Lord Denning since legislation alone seems a proper way of making so great a change in the law. The criterion which Lord Denning proposes is, moreover, by no means clear. It is evidently not the traditional distinction between acts *jure gestionis* and *jure imperii* since at p. 418 he rejects this as a 'rule of immunity for public and not for private acts, which has turned out to be a most elusive test'. It is not entirely clear how his criterion differs from the traditional one, and it is submitted that it seems likely to be at least as 'elusive' particularly when applied by the English courts which are used to a system of law which does not, in general, distinguish between commercial and non-commercial transactions.

The chief interest of this case, as in all such cases, is what interest was regarded as sufficient to found a claim for immunity. Turning again to the opinions of their Lordships other than Lord Denning, we find that they used terms such as 'owner', 'title', 'possession' and 'control', without exact discrimination; but they considered that narrow distinctions were inappropriate in this field and recognized that 'the law cannot be set at rest by any neat combination of words'. They emphasized the right of the Government of Pakistan to sue the Bank direct. But, apart from questions of immunity, the Bank could presumably set up the Nizam's claim by way of defence, and indeed, if it did not wish to risk having to pay twice, would have to do so or else to interplead. It is true that the Nizam also, on the facts as alleged, would succeed in an action against the Bank. But their Lordships clearly regarded the Government of Pakistan as having, by virtue of the transfer into the name of their agent, a present 'legal title' and being, so to speak, 'the man in possession', and regarded an action by it as an action to enforce a present legal interest; an action by the Nizam would be an attack on that present legal interest, and the Government of Pakistan was entitled to resist any adjudication of the merits of such an attack.

Their present legal title was not an 'illusory claim' or a 'manifestly defective title' merely because it was apparently open to attack by an action.

H. G. DARWIN

B. PRIVATE INTERNATIONAL LAW

Judicial separation

Case No. 1. *Tursi v. Tursi*¹ is the first reported English decision upon the effect to be given to a decree of judicial separation pronounced by a foreign court. This in itself makes it a case of importance, at least for the time being. The absence of earlier authority is not altogether surprising. Judicial separation does not alter status. The purposes for which the validity of a foreign decree will fall to be considered in English courts are therefore relatively few. The paucity and nature of these purposes should not be forgotten when approaching this problem. This is not an area in which any rule is likely to have far-reaching and unforeseeable consequences. Excessive caution is therefore not called for.

In *Tursi v. Tursi* the question before Sachs J. was as to the effect of a foreign decree for the purposes of the rule in *Harriman v. Harriman*² (as modified by section 7 (3) of the Matrimonial Causes Act, 1950).

A wife, who was at all material times domiciled in Italy, in 1955 filed a petition for divorce in England on the grounds of her husband's desertion. The petitioner having been resident in England for more than three years, the English Court assumed jurisdiction under section 18 (1) (b) of the Matrimonial Causes Act, 1950. The petition was undefended, but it was argued on behalf of the Queen's Proctor that the decree sought should not be granted. In 1947 the petitioner had in Italy obtained a decree of judicial separation from her husband on the grounds of his desertion since 1942 and his cruelty. The rule in *Harriman v. Harriman* is that separation orders in justices' courts and *a fortiori* decrees of judicial separation of the High Court cause desertion to cease to run. A limitation was placed upon the operation of this rule by section 6 of the Matrimonial Causes Act, 1937. This was re-enacted in section 7 (3) of the Matrimonial Causes Act, 1950, which provides that 'a period of desertion immediately preceding the institution of proceedings for a decree of judicial separation or an order under the said Acts [the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949] having the effect of such a decree shall, if . . . the decree or order has been continuously in force since the granting thereof, be deemed immediately to precede the presentation of the petition for divorce'. In *Tursi v. Tursi* Sachs J. decided that the earlier decree of judicial separation although pronounced by a foreign court would bring the rule in *Harriman v. Harriman* into operation, but also that the words 'a decree of judicial separation' in the above-quoted statutory enactment cover foreign decrees. The husband had been in desertion for three years immediately preceding the Italian decree: the petitioner could therefore succeed and the marriage be dissolved.

In recognizing the foreign decree Sachs J. followed the decision of the High Court of Australia in *Ainslie v. Ainslie*.³ There a court of Petty Sessions in Western Australia had granted a decree of judicial separation in favour of a wife. At the time the husband and wife were both domiciled and resident in Western Australia. Later, while the husband was domiciled and resident in New South Wales, and the wife was temporarily resident there, the husband instituted proceedings in the Supreme Court of New South Wales for restitution of conjugal rights. The wife pleaded the Western Australian order. Her plea was successful and the High Court of Australia (Knox C. J., Isaacs, Rich and Starke JJ.; Higgins and Powers JJ. dissenting) upheld this decision. As Sachs J. pointed out⁴ in *Tursi v. Tursi*, on the facts then before him the case for recognition was, if anything, stronger than it had been in *Ainslie v. Ainslie*. In the early case the couple had changed its domicil to the state of the *forum* and both of them were resident there: in *Tursi v. Tursi* the couple was still domiciled in Italy and only the wife was resident in the country of the *forum*.

¹ [1958] P. 54.

³ (1926), 26 S.R. (N.S.W.) 567; (1927), 39 C.L.R. 381.

² [1909] P. 123.

⁴ [1958] P. 54, 61.

Tursi v. Tursi clearly provides English authority for the general proposition that foreign decrees of judicial separation will in some circumstances be recognized. The reasoning of the dissentient Higgins J. in *Ainslie v. Ainslie* has not prevailed. That distinguished Australian judge argued that judicial separation is an action for the protection of parties from misconduct during marriage. It is not concerned with the status of the parties but with behaviour in a certain law district. This argument, to use what is now outmoded terminology, is that it is a matter of territorial rather than personal jurisdiction.

The answer to a general question usually provokes the asking of more detailed ones. One question which is provoked by *Ainslie v. Ainslie* and *Tursi v. Tursi* is as to what the decisions would have been had the parties been merely resident and not domiciled in Western Australia and Italy respectively when the proceedings for judicial separation were instituted.

A decree of judicial separation does not alter status. One traditional argument for the pre-eminence of domicile is therefore absent. In *Ainslie v. Ainslie*, however, the majority expressly declined to comment on the efficacy of a decree pronounced by the court of residence. Moreover, in the Victorian case of *Perry v. Perry*¹ Macfarlan J. refused to recognize a decree of judicial separation pronounced in Western Australia when the parties (who were domiciled throughout in Victoria) were temporarily resident there. The learned judge noted that residence may be enough in England and Victoria for the assumption of jurisdiction, but he did not feel compelled to give recognition to a foreign decree granted in similar circumstances. In *ex parte Pels*² Hathorn J. in the High Court of Southern Rhodesia cited³ the following passage from the 6th edition of Dicey, 'There is a lack of English authority on the question of the jurisdiction of foreign courts in matters of judicial separation and restitution of conjugal rights, but English courts could not logically refuse to recognise the authority of the courts of the domicile or matrimonial residence in these matters.'⁴ Of *Ainslie v. Ainslie* the learned judge said: 'It is thus clear that the case is authority for the proposition stated in Dicey.'⁵ This statement cannot go unchallenged. It is consistent neither with what was said in *Ainslie v. Ainslie* nor with what was decided in *Perry v. Perry*. However, it seems probable that the Dutch decree which was recognized in *ex parte Pels* was in fact a decree of the courts of the domicile. Hathorn J. described the petitioner as 'apparently a Hollander'.⁶ Moreover, he regarded himself as following the decisions in *ex parte Worth*⁷ and *Ainslie v. Ainslie*. He seems to have taken an unjustifiably wide view of the *ratio* of the latter; but there, as in *ex parte Worth* (an earlier Southern Rhodesian case), the decrees recognized were granted by courts of countries in which the parties were at the time not only resident but also domiciled.

In the very recent and so far only lightly reported English case of *Hughes v. Hughes*,⁸ Judge Rawlins, sitting as a Special Commissioner, granted a decree *nisi* in divorce proceedings instituted by a husband on the grounds of his wife's desertion. The wife, resident in Denmark, had obtained a decree of judicial separation from a Danish court. The couple was throughout domiciled in England. The learned Commissioner held that the English courts could not recognize the Danish decree for the purpose of terminating the respondent's desertion. He took the view that recognition can be given to a foreign decree of

¹ [1947] V.L.R. 470.

² (1957) (2) S.A. 632 (S.R.).

³ (1957) (2) S.A. 632, 634 (S.R.).

⁴ Dicey, *Conflict of Laws*, 6th ed., p. 372. This passage does not occur in the 7th edition of Dicey which states: 'Whether foreign decrees of judicial separation granted by the courts of the parties' residence would be recognised in England is an open question.' Ibid., 7th ed., p. 338.

⁵ (1957) (2) S.A. 632, 635 (S.R.).

⁶ (1957) (2) S.A. 632, 633 (S.R.).

⁷ (1951) (4) S.A. 230. Also reported as *ex parte Charlesworth*, [1951] S.R. 146, under which name and reference it is mentioned in Dicey, *Conflict of Laws*, 7th ed., p. 338, footnote 10 and p. 344, footnote 57.

⁸ [1958] 7 *Current Law* 47.

judicial separation only if that decree is based on a jurisdictional ground which *mutatis mutandis* the English courts claim for themselves. The wife at the time of the decree had been resident in Denmark for two years, and residence of the wife alone in England for two years would not give the English courts jurisdiction to grant a decree of judicial separation. This reasoning introduces the principle of *Travers v. Holley*¹ into this branch of the law. It will be remembered that in *Perry v. Perry*² Macfarlan J. of the Supreme Court of Victoria refused to be influenced by any such consideration. But that case was decided before *Travers v. Holley*. Moreover, *Travers v. Holley* has not commended itself to the Supreme Court of Victoria even in divorce cases.³ It would seem, however, that in a jurisdiction which, for better or for worse, accepts the *Travers v. Holley* doctrine, no distinction can reasonably be drawn between cases of divorce and those of judicial separation. England is such a jurisdiction. As English courts are willing to grant decrees of judicial separation when both parties are resident here, it would seem that recognition ought to have been accorded to the Italian decree in *Tursi v. Tursi* even if the parties had not at the time of the proceedings been domiciled but had been merely resident in Italy. This is, however, a question which was not before Sachs J. and upon which he expressed no view.

Another matter which sometime the courts may have to consider is the nature of any limitations upon the recognition⁴ of foreign decrees of judicial separation apart from lack of international jurisdictional competence. One possibility is that hinted at by Macfarlan J. in *Perry v. Perry*. There the relevant Western Australian legislation (unlike that in the *Ainslie* case) provided that 'No order under this Act shall affect the order of any court of superior jurisdiction.' The learned judge said: 'in my opinion, a Victorian Court would not recognize [the Western Australian separation order] as binding on itself unless it were at least satisfied that it was binding on the superior Courts of Western Australia.'⁵ It is scarcely credible, in a matter like judicial separation and having regard to the territorial connotations of at least some of the policy needs which it serves, that effect would be given in the High Court in England to a foreign decree which would not bind the corresponding tribunal in the country where it was pronounced.

Yet another limitation is perhaps implicit in the *ratio* of *Tursi v. Tursi* itself. Sachs J. found that the Italian decree 'corresponds with considerable exactitude to a decree of judicial separation as pronounced by the courts in this country'.⁶ More particularly the learned judge directed his attention to the requirement of finality. He rejected the argument that the Italian decree was not a final order on account of the possibility that it might become discharged at a later time. It is to be noted that not only lack of finality but also excess of finality may perhaps impede recognition. This possibility materialized in the South African case of *McNaught v. McNaught*.⁷ That was an action by a husband for restitution of conjugal rights. The wife relied upon a decree of separation *a mensa et thoro* which she had obtained in Scotland. The husband succeeded. Greenberg J. said: 'Under Scots law a decree of this kind, which purports to be a life-long separation, cannot be set aside on the ground that the reasons for which it was granted have ceased to exist, or indeed on any ground other than the consent of the parties. . . . The Court will not readily give its approval to a state of affairs which puts it beyond the power of the plaintiff to require either that his wife should return to him (provided he has reformed) or that the marriage be dissolved; this would be the result of allowing the decree to operate as a bar to the action.'⁸ In *ex parte Worth*, where an English separation order was recognized in the High Court of Southern Rhodesia, *McNaught v. McNaught* was distinguished. Morton J. said: 'In the present case . . . the order appears on the face of it to be capable of being altered, varied or discharged in due course of law.'⁹

The judgment of Sachs J. in *Tursi v. Tursi* is also noteworthy for a reason not specifically

¹ [1953] P. 246.

³ *Fenton v. Fenton*, [1957] V.L.R. 17.

⁵ [1958] P. 54, 61.

⁷ (1937), W.L.D. 103, 108-9.

² [1947] V.L.R. 470.

⁴ [1947] V.L.R. 470, 474.

⁶ (1937), W.L.D. 103.

⁸ (1951), 4 S.A. 230, 232.

connected with the recognition of foreign decrees of judicial separation. Jurisdiction was assumed by virtue of section 18 (1) (b) of the Matrimonial Causes Act, 1950. Sachs J. in the opening paragraph of his judgment took the opportunity to say:

'That subsection, or to be exact, its predecessor, produced a departure of a far-reaching nature from the broadly based concept that jurisdiction in divorce depends on the domicile of the parties: and incidentally it has in many countries not unnaturally attracted the criticism of those concerned with the application of private international law to marriages. It provides that women of all countries can, after three years' residence here, obtain a divorce under the law of this country irrespective of their domicile and irrespective of the fact that their husbands have never visited this country and have never had the remotest link with it. Its provisions are thus calculated to attract to this country women who have been born, brought up, married and lived in the country of their husband's domicile, and to whom continued application of the matrimonial law of that country might not seem unduly unreasonable. It lays down that the courts of this country are thus to give decrees of divorce that, as in the present case, would not necessarily be recognized in the country of domicile, and may also not be recognized in many other civilized countries. These matters are so clear that it must be taken by the courts that the legislature intended them. . . .'¹

It is respectfully agreed that the provisions of section 18 (1) (b) have, viewed in isolation, always been open to very grave objection. It is submitted that such objection, and, indeed, objection to any additional grounds for the assumption of jurisdiction when the proceedings are instituted by a wife rather than a husband, will become unanswerable when, and if, the Domicile Bill, at present before Parliament, becomes law. This Bill in its amended form abolishes the dependency of a wife's domicile. The earlier statutory relief which was given to the wife was illogical and piecemeal and was provoked only by the urgent necessity of avoiding some of the injustices produced by the common law rule that a wife's domicile follows that of her husband. That provocation may now be removed. On grounds of both policy and logic equality of the sexes in the law of jurisdiction should be the inevitable concomitant of their equality in the law of domicile. Judicial condemnation of section 18 (1) (b) is welcome and it is to be hoped that the section will not be allowed to survive the abolition of that defect in the common law which was the only possible justification for its original enactment.

Adoption

Case No. 2. Notwithstanding the occurrence of several cases² on the subject recently, the sum total of English authority on adoption in private international law remains meagre. Nor can any hope that the appeal from the decision of Harman J. in *In re Marshall*³ would be the occasion for an authoritative pronouncement by the Court of Appeal of the general principles governing the subject be regarded as fulfilled. Over-generalization in an early phase of the evolution of case-law has sometimes been in other branches of private international law, and could be here, perniciously shortsighted. On the other hand, it is submitted with respect that two questions deliberately left open by the Court of Appeal in *In re Marshall* could have been resolved with safety.

The facts there were as follow. A testator who died domiciled in England in June 1945, had by his will dated April 1945 bequeathed legacies and his residuary estate after the death of his wife to certain named cousins including one, C. S. Jones, with the proviso that 'should any of the above cousins be then dead leaving issue then living such issue shall take the share which his her or their parent would have taken had such parent survived me and my said wife and if more than one in equal shares'. C. S. Jones died in 1950. The wife died in 1955. The appellant was C. S. Jones's adopted child and claimed by

¹ [1958] P. 54, 60.

² *In re Wilson*, [1954] Ch. 733; *In re Wilby*, [1956] P. 174.

³ [1957] Ch. 263 (Harman J.); [1957] Ch. 507 (C.A.).

substitution the share which he would have taken had he survived the period of distribution of the testator's estate. Before 1912 C. S. Jones obtained a domicile in British Columbia. In March 1945 he and his wife, by order of the Supreme Court of British Columbia, adopted the appellant who was also domiciled in British Columbia.

The question of most general interest argued before Harman J. and before the Court of Appeal was as to whether a child of foreign domicile who is adopted by a person of the same domicile and in accordance with the law of that domicile can ever take under the will of a testator domiciled in England. Harman J. expressed willingness to decide this question in the affirmative, but the Court of Appeal declined to pronounce upon it. In 1956 *In re Wilby*¹ Barnard J. held that such a child could not take upon the intestacy of a person dying domiciled in England. In so doing the Learned Judge was clearly much influenced by the difficulties of characterization which he feared would often arise if account were taken of foreign adoptions. Whatever the force of this consideration, it is equally great or small in a case of testacy, and Harman J. conceded the inconsistency of his decision with that in *In re Wilby*. The learned judge pointed out that estimation of the effect of foreign systems of law is a task which is often faced. It is submitted with respect that to this extent at least Harman J. was unquestionably right. Difficulty of characterization, unless likely in practice to be frequent and insuperable, is not in itself an attractive reason for rejecting a choice of law rule. The word 'adoption' (or a translation of it) may be very variously used in different legal systems. But it does not follow from this that efficacy must be denied to those procedures which are in form and in effect essentially similar to English adoptions.

It is to be remarked, however, that Barnard J. was also influenced by the necessity of construing strictly the Administration of Estates Act, 1925, as amended by the Adoption Act, 1950. He said in the course of his judgment: 'The adoption in this case would, no doubt, be recognised as valid in this country for some purposes, but what I have to decide is whether it entitles the adoptive mother to succeed to the deceased's estate on an intestacy.'² This perhaps opens up the possibility of regarding *In re Wilby*, unless (or preferably, until) it is overruled, as being authority only for the rule that when English law is applied *qua lex successionis* upon an intestacy foreign adoptions must be ignored.

The Court of Appeal, although not pronouncing upon Harman J.'s view that in some circumstances a foreign adopted child may take in an English succession, doubted whether as much guidance on the question 'is afforded by the decision of this court in *In re Luck's Settlement Trusts*³ as Harman J. appears to have thought'.⁴ Harman J. had said 'for an English lawyer the authoritative decision is *In re Luck's Settlement Trusts* in the Court of Appeal, where the judgement of the majority (Sir Wilfred Grene M.R. and Luxmore L.J.) definitely states that the principle of the legitimation cases is applicable to cases of adoption'.⁵ The learned judge then quoted a passage which supports not this proposition but the principle that the rules relating to legitimation *per subsequens matrimonium* should apply equally to all forms of legitimation. *In re Luck's Settlement Trusts* was, of course, itself a case not of adoption but of legitimation by recognition. One cannot but agree with Romer L.J., delivering the judgment of the Court of Appeal in *In re Marshall*, an adoption case, when he says of the earlier case: 'We think there is no sufficient reason to suppose that any of the members of this court were directing their attention to a position such as exists in the present case.'⁶ On the other hand, it is to be hoped that the Court of Appeal's rejection of Harman J.'s treatment of *In re Luck's Settlement Trusts* as a binding authority in adoption cases will not in future be regarded as being a rejection of the whole of the learned trial judge's reference to that case. In countenancing the possibility of the appellant taking under the will, he said: 'I am aware that this is not consistent with Barnard J.'s view in *In re Wilby*. He was impressed with the difficulty for an English judge of estimating the effect of foreign systems of law. This is no doubt formidable, but is a task often

¹ [1956] P. 174.

³ [1940] Ch. 864.

⁵ [1957] Ch. 263, 272.

² [1956] P. 174, 179-80.

⁴ [1957] Ch. 507, 520.

⁶ [1957] Ch. 507, 520.

faced. It is in English courts a question of fact to be ascertained on proper evidence of skilled persons. It does not prevent the law of the domicile prevailing in cases of legitimation by other means, and should not do so, in my view, in cases of adoption which is a kind of legitimation.¹ The absence of the need for a blood tie distinguishes adoption from legitimation. This is why Harman J. ought not to have regarded himself as bound by legitimation cases. But the fact that English courts have been prepared and able to investigate foreign legitimation laws, even those regulating modes of legitimation unknown to English domestic law, is very important when weighing the merits of this part of Barnard J.'s reasoning.

The legitimation cases are also relevant in another way. Foreign legitimations were recognized at a time when legitimation was no part of English domestic law.² Foreign legitimations are still recognized although not complying with English domestic law. The argument that by analogy there is no *a priori* reason for refusing to recognize foreign adoptions is a very strong one.

If the Court of Appeal had acknowledged the absence of any such *a priori* reason the evolution of rules relating to recognition of foreign adoptions would still have remained for determination in future cases. It is to be noted that in *In re Marshall* the adoption was in British Columbia and that both the adopter and the adoptee were domiciled in British Columbia. It would seem indeed to be the simplest situation. But would the case for recognition be weakened if either or both parties were not domiciled but merely resident there? Would it be weakened if the adoption, although it had not taken place in the country of the parties' domicile or residence, would be recognized in that country? One can easily multiply such inquiries. But it is not yet clear that any search for answers is worthwhile, for the Court of Appeal has declined to admit that England has a private international law of adoption, at any rate in the all-important field of succession.

The appellant in fact failed both before Harman J. and before the Court of Appeal. What was decisively fatal to his claim was the state of the *lex adoptionis* at the time of the testator's death: by British Columbian law at that time he was not one of 'those who are placed by adoption in a position, both as regards property rights and status, equivalent, or at all events substantially equivalent to that of the natural children of the adopter'.³ The Court of Appeal held that, even on the assumption (to which, unlike Harman J., it was not willing to commit itself) that a foreign adopted child could sometimes take as a child or issue under an English will, only persons in the above defined position could be treated as being within the scope of the testator's contemplation.

Both Harman J. and the Court of Appeal held that the relevant date for ascertaining the class of persons capable of taking was that of the testator's death in 1945. Having regard to the revocability of a will, this is in principle clearly right.⁴ Harman J. expressed the view that had the relevant date been that of the death of the testator's wife in 1955 when the interest vested, then changes brought about in 1953 in British Columbian law would have enabled the appellant to succeed. Of that legislation, he said: 'The effect of this was that an adopted person stands in regard to the kindred of his parent by adoption in the same position as if born of that parent in lawful wedlock.'⁵ The Court of Appeal was, however, unwilling to commit itself to this view of the 1953 legislation. This is the second matter in which it is submitted with respect that the Court could more happily have given guidance by accepting the views of Harman J.

The Court considered that the position of the adopted child even in 1955 'still fell a good deal short of the status of a child in the true sense'.⁶ This is exemplified by the fact that if an illegitimate child was adopted by its parent it did not become legitimated, and by the fact that the child domiciled elsewhere did not upon adoption automatically acquire the domicile of the adopter. It is submitted with respect that such matters merit little

¹ [1957] Ch. 263, 273-4.

² For example, in *In re Goodman's Trusts* (1881), 17 Ch. D. 266, whereas legitimation by subsequent marriage was not introduced into English domestic law until 1 January 1927.

³ [1957] Ch. 507, 523.

⁴ But see Dicey, *Conflict of Laws*, 7th ed., p. 471.

⁵ [1957] Ch. 263, 271.

⁶ [1957] Ch. 507, 527.

attention when considering the ambit of a testator's contemplation. Moreover, they are matters which had no application to the appellant in the instant case.

'Universal succession' to a corporation's contractual liabilities

Case No. 3. The facts in *National Bank of Greece and Athens S.A. v. Metliss*¹ are now well known.² The House of Lords (Viscount Simonds, Lord Morton of Henryton, Lord Tucker, Lord Keith of Avonholm and Lord Somervell of Harrow) has affirmed the decision of the Court of Appeal. The main issues before their Lordships' House were essentially the two which had been before the Court of Appeal, namely, (1) the significance to be attached to the amalgamation of the original guarantor company with the National Bank of Athens, and (2) the significance of the Greek moratorium law. Both issues were again resolved in favour of the respondent.

The latter question may be mentioned shortly. It was conceded that English law was the proper law of the contract. It was also conceded that the old bank, i.e. the original guarantor, could not have relied on the moratorium if it had been sued in England. It was held that Greek legislation could not vary an obligation governed by English law.

The former question was as to whether the respondent could sue the appellants on a contract of guarantee to which they were not an original party. This involved what was in effect a problem of characterization or classification. The status of the appellant company was governed by the law of the domicile which was Greek law. But the proper law of the contract was English law. The problem had to be characterized in order that the applicable choice of law rule could be identified. Their Lordships held in effect that the question pertained to status rather than contract, that Greek law was applicable and that the respondent was therefore able to sue the appellants.

The decision of the House of Lords was made in the absence of authority. Lord Simonds (with whom Lord Somervell agreed) distinguished the case of *Antony Gibbs & Sons v. Société Industrielle et Commerciale des Métaux*³ as not being in point. There the parties entered into a contract of which the proper law was English. The defendants, being domiciled in France, made default and pleaded when sued in an English court that they had been placed in judicial liquidation by the Tribunal of Commerce of the Seine. This plea was rejected. Lord Simonds pointed out in the *Metliss* case that, although this finding would be relevant if the original guarantor company were being sued and pleaded that its liability ended with its dissolution by the law of the domicile, this was not the issue in the present case. His Lordship said: '... it is the fundamental fallacy of the appellants'

¹ [1957] 3 W.L.R. 1056.

² The decision of the Court of Appeal (*sub nom. Metliss v. National Bank of Greece and Athens S.A.*, [1957] 2 Q.B. 33), was noted in this *Year Book*, 33 (1957), pp. 343-5. The facts, as there set out, are reproduced here for convenience. 'In 1927 the National Mortgage Bank of Greece (a company incorporated under Greek law) issued sterling mortgage bonds repayable as to principal in 1957, with interest thereon meanwhile. The bonds were guaranteed as to principal and interest by the National Bank of Greece (also a company incorporated under Greek law). In 1941 the payment of interest ceased. In 1949 the Greek Government declared a moratorium on all obligations on the bonds including any right of action. In 1953, by an Act of the Greek Government and by Greek royal decree, the National Bank of Greece (the guarantor bank) and a third bank, the National Bank of Athens, ceased to exist and were amalgamated into a new company the National Bank of Greece and Athens. It was enacted that this new company was the "universal successor" to the rights and obligations of the amalgamated companies. In 1955 the National Mortgage Bank of Greece (the original debtor bank) made an offer to English bondholders that it should be guaranteed by the new company. The plaintiff, who was the holder of bearer bonds, did not accept this offer but brought an action in the High Court against the new company, claiming interest from 1941 to 1955 inclusive, on the ground it was the assignee and transferee of all the assets and liabilities of the guarantor bank, including its liability under the guarantee. Sellars J. awarded the plaintiff six years' interest.' (*The Times* newspaper, 13 July 1956.) The learned judge found that the proper law of the contract was English law, and at the hearing of the defendant's appeal to the Court of Appeal this was conceded. The Court of Appeal affirmed the decision of Sellars J.

³ (1890), 25 Q.B.D. 399.

argument that the two propositions are treated as complementary, that is to say that, if our law would regard the original company as still liable, the new company can disclaim the liability which is imposed upon it by Greek law. . . .¹

In the absence of authority their Lordships were guided by principle. All reached the same conclusion, but not all by the same route. Three alternative approaches are apparent.

Lord Keith of Avonholm relied upon the notion of universal succession, an analogy which had found favour in the courts below. The appellant was declared by the relevant Greek law to be the 'universal successor' of the banks which were absorbed and extinguished by the amalgamation decree. His Lordship said of the universal successor: 'He is no more to be regarded as a new party introduced into a contract than is an executor or administrator of a dead man's estate in English law.'² He later continued: 'The extinction of a corporation under statute or decree and the passing of all its rights and liabilities to a successor exhibits, in my view, all the features of a universal succession. . . . I accordingly reject the contention that the appellant bank is not liable to be sued on the contract of guarantee, as not being a party to the contract. It is just as liable as would be the executor in England of a deceased debtor.'³ Lord Morton of Henryton, too, by accepting the reasoning of the Court of Appeal, concurred with the general lines of this approach.

Lord Tucker seems to have characterized the problem by reference to analytical jurisprudence. He rejected the contention 'that "status" is confined to the existence, powers and dissolution of the new corporation'.⁴ His Lordship characterized the liability of the appellants as a matter of status rather than contract. He said:

'The identity of the old bank has become merged in the amalgamation by a process which is by no means alien to English legal conceptions. It is of the very essence of the transaction that the liabilities and assets of the former should attach to the latter, and to recognize the existence of the new entity but to ignore an essential incident of its creation would appear to me illogical. Why an English court should be compelled to recognize that part of the decree which has extinguished the old bank but refuse to give effect to matters which are of the essence of the process of amalgamation I find it difficult to understand. In my view, the fact that this liability was attached to it at birth by its creator can properly be regarded as a matter pertaining to the status of the appellant company and accordingly governed by the law of its domicile.'⁵

Lord Simonds (with whom Lord Somervell agreed) approached the matter very broadly: 'My Lords, in the end and in the absence of authority binding this House, the question is simply: What does justice demand in such a case as this?'⁶ This has an attractive simplicity. It is submitted with respect that there are also other reasons why it is to be preferred to reasoning which involves reliance upon the universal succession analogy and to reasoning which rests upon the existence of an analytically valid distinction between status and its incidents (such as liability in contract).

The objections to the use of the analogy of universal succession seem to be several. Lord Simonds said of it: 'I do not care to rest my opinion upon a conception which is at the least artificial.'⁷ Moreover, reliance upon this analogy would be less helpful and more artificial if the legislation of the domicil had done something less than transfer *all* the rights and obligations of the old entity to the new entity. Even in such a case considerations of policy and justice might require that the legislation should nevertheless be regarded as pertaining to status. The danger of gearing a rule to an analogy is that an otherwise desirable application of the rule to a particular case may be hindered simply because such application would involve also an extension of the analogy.

¹ [1957] 3 W.L.R. 1056, 1062.

³ [1957] 3 W.L.R. 1056, 1068-9.

⁵ [1957] 3 W.L.R. 1056, 1067.

⁷ [1957] 3 W.L.R. 1056, 1062.

² [1957] 3 W.L.R. 1056, 1068.

⁴ [1957] 3 W.L.R. 1056, 1067.

⁶ [1957] 3 W.L.R. 1056, 1063.

Again it would seem that the analogy of universal succession might have undesirable ramifications if the question of the right of the respondent to sue the original guarantor had arisen. The decision in *Antony Gibbs & Sons v. Société Industrielle et Commerciale des Métaux* and the way in which that decision was distinguished in the *Metliss* case seem to leave open the possibility that the original guarantor could still have been sued.

Some of Lord Tucker's reasoning is also difficult to reconcile with this possibility. His Lordship said: 'Why an English court should be compelled to recognize that part of the decree which has extinguished the old bank but refuse to give effect to matters which are of the essence of the process of amalgamation I find it difficult to understand.'¹ With respect it is suggested that it is not clear beyond all doubt on the present state of authority that an English court would for all purposes be compelled to recognize that part of the decree which extinguished the old bank.

Of 'status' Lord Simonds said: 'That is a convenient word to use. But what does it include or exclude?' He finds an answer by reference to 'the principle of rational justice'.² Lord Tucker refers to logic: 'to recognize the existence of the new entity but to ignore an essential incident of its creation would appear to me illogical.'³ It is submitted with respect that a purely logical line between status and incidents is difficult to draw. Moreover, unquestioning respect for such a line, if drawn, would not necessarily be desirable. The important question is, in the absence of authority, one of justice or policy. Is this matter (i.e. the right of the respondent to sue the appellants on a contract of guarantee to which they were not an original party) most appropriately governed by the law of the respondent's domicile or by the law of the contract? As a learned writer has said, 'The reason why one conflict rule is preferred to another—i.e. why a certain characterisation is made—is to be found in considerations of justice and social convenience.'⁴

Exercise by will of power of appointment

Case No. 4. The applicability of section 27 of the Wills Act, 1837, to the will of a testatrix domiciled in Guernsey and the enforceability of *legitima portio* rights under the law of that domicile against property appointed by the will under a general power of appointment created by an English settlement were questions considered by Danckwerts J. in *In re Waite's Settlement Trusts*.⁵ Section 27 provides '... a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by will'. The learned judge held that section 27 could be applied to render a residuary bequest by a foreign testatrix an effective exercise of such a general power of appointment. He also held, approving passages in Halsbury's *Laws of England*⁶ and Cheshire's *Private International Law*⁷ and not following Dicey's *Conflict of Laws*,⁸ that the capacity of the testatrix to dispose of the appointed property was to be wholly determined in accordance with the law governing the settlement creating the power of appointment even though the power concerned was general and not special.

The facts of the case were as follows: Trust funds comprised in an English settlement were in 1924 appointed by a deed governed by English law on trust to pay the income thereof to the testatrix for life and after her death in trust as she should by deed will or codicil appoint, and in default of and subject to such appointment to her daughter absolutely. In 1949 the testatrix, then domiciled in Guernsey, made a will (which satisfied the formal requirements of both English and Guernsey law) declaring that she was domiciled there and containing a residuary bequest by which she left 'the rest, residue and re-

¹ [1957] 3 W.L.R. 1056, 1067.

² [1957] 3 W.L.R. 1056, 1063.

³ [1957] 3 W.L.R. 1056, 1067.

⁴ Lalive, *The Transfer of Chattels in the Conflict of Laws*, p. 3.

⁵ [1958] 1 Ch. 100.

⁷ 4th ed., pp. 538, 539. Cf. 5th ed., pp. 548, 549.

⁸ 6th ed., pp. 855, 856. Cf. 7th ed., pp. 641-4.

⁶ 3rd ed., vol. vii, p. 62.

mainder of the portion of my personal estate whereof I have the disposal according to law to E.B. absolutely'. The testatrix died in 1954 still domiciled in Guernsey. Her trustees took out a summons to ascertain whether, and if so to what extent, the residuary bequest operated as an effective exercise of her general power of appointment. The interested parties were the residuary legatee and the testatrix's son and daughter. On behalf of the residuary legatee it was claimed: (i) that section 27 of the Wills Act, 1837, applied to make the bequest an effective exercise of the power; or, alternatively, (ii) that, if the *legitima portio* rules under the law of Guernsey applied, the testatrix had validly exercised her power of appointment over half the property. For the daughter it was argued (i) that section 27 of the Wills Act, 1837, did not apply and that she should receive the whole of the trust funds by virtue of the gift over in default; or, alternatively, (ii) that she was entitled to claim one-half of the trust funds in default since the testatrix only had testamentary capacity over half her property and could therefore only exercise her power by will to that extent. For the son it was argued that section 27 did apply but that the effect of the appointment under the residuary bequest was to make the appointed funds one mass with the testatrix's own estate and that the whole of this mass was subject to the law of Guernsey under which the testatrix was unable to leave more than half of her property by will, the other half being shared equally between her son and daughter.

Evidence was given as to the relevant law of Guernsey by which: (1) the residuary bequest was not regarded as a valid exercise of the power; (2) the testatrix was entitled to dispose by will of one-half of her personal estate; (3) her son and daughter were entitled to the remaining half in equal shares.

Danckwerts J. followed the decisions in *In re Baker's Settlement*,¹ *In re Simpson*,² *In re Wilkinson's Settlement*³ and *In re Strong*⁴ and reached the conclusion that section 27 of the Wills Act, 1837, could be applied to the wills of donees of powers who were domiciled abroad. So long as there is a will which is admissible to probate by the English courts section 27 can be applied to determine whether a general power of appointment created by an English settlement has been validly exercised therein. To this extent the decision does not seem to be open to question. Indeed, in so far as the will in question satisfied the formal requirements of English domestic law, it is less sweeping than the decisions in *In re Simpson* and *In re Wilkinson's Settlement* in which section 27 was applied to wills valid only by virtue of the law of the testator's domicile.

The learned judge's conclusion that the decision that section 27 applied 'was sufficient to decide the whole matter' and that no question could then arise of any restriction imposed by the law of the testatrix's domicile being recognized by English courts as extending to the property subject to the power, raises controversial issues. Danckwerts J. accepted the view expressed in Halsbury's *Laws of England*⁵ that no reference need be made to these limitations on testamentary capacity since 'such restrictions apply to property, and a power of appointment is not a right of property' and cited in support *Pouey v. Hordern*,⁶ *In re Mégret*⁷ and *In re Bald*,⁸ and also Cheshire's *Private International Law*.⁹ The learned judge refused to accept the contrary view in Dicey's *Conflict of Laws*¹⁰ which was based on the decisions in *In re Pryce*¹¹ and in *In re Lewal's Settlement Trusts*.¹² Danckwerts J. distinguished the former of these cases on three grounds: (i) the will in issue in *In re Pryce* was entirely in Dutch language and form; (ii) section 27 of the Wills Act, 1837,

¹ [1908] W.N. 161.

² [1916] 1 Ch. 502.

³ [1917] 1 Ch. 620; 30 T.L.R. 267.

⁴ (1925), 95 L.J. Ch. 22.

⁵ 3rd ed., vol. vii, p. 62.

⁶ [1900] 1 Ch. 492. This case concerned, as Danckwerts J. pointed out, a special power: but *dicta* of Farwell J. in the case formed the basis of the extension of the principle to general powers in *In re Mégret*.

⁷ [1901] 1 Ch. 547.

⁸ (1897), 66 L.J. Ch. 524.

⁹ 4th ed., pp. 538-9. Cf. 5th ed., pp. 548-9.

¹⁰ 6th ed., pp. 855-6. Cf. 7th ed., pp. 641-4.

¹¹ [1911] 2 Ch. 286.

¹² [1918] 2 Ch. 391; 34 T.L.R. 538.

did not come 'into the consideration of the court' in that case; and (iii) there was very positive evidence as to the effect of Dutch law on the terms of the will. In addition he suggested that the authority of *In re Pryce* had been 'weakened' in the subsequent House of Lords decision in *O'Grady v. Wilmot*¹ in which *In re Hadley*² and *In re Moore*,³ both cases which had 'influenced' *In re Pryce*, had been overruled. *In re Lewal's Settlement Trusts* the learned judge regarded as 'unsatisfactory' and described the result therein as 'difficult to understand'. He therefore refused to follow that decision in the instant case 'in the face of what appear to me to be the logical considerations to the contrary'.⁴

Since *In re Waite's Settlement Trusts* was decided the 7th edition of Dicey's *Conflict of Laws* has been published and it contains⁵ a detailed criticism of the case and in particular the attitude of Danckwerts J. to *In re Pryce*. The editor gives three main reasons for submitting that *In re Waite's Settlement Trusts* was wrongly decided. Firstly, the argument that *O'Grady v. Wilmot* had 'weakened' the authority of *In re Pryce* could not be accepted since (i) the issues in the two cases differed; (ii) the important factor in *In re Hadley* which influenced the Court of Appeal in *In re Pryce* was the *dicta* of Farwell L.J. and not the actual decision itself; and (iii) no doubt was cast in *O'Grady v. Wilmot* on the correctness of the decision *In re Pryce*. These reasons seem persuasive. Secondly, the editor of Dicey's *Conflict of Laws* criticizes Danckwerts J.'s attempt to distinguish *In re Pryce* on the grounds that the will in that case was in the Dutch language and form and the fact that section 27 of the Wills Act, 1837, was not applied. He correctly points out that while the language and form of a will may be relevant to the question of its construction it is not relevant to the question of the essential validity. This criticism, however, ignores the fact that in the view of Danckwerts J. the choice of law problem in *In re Waite's Settlement Trusts* was one solely of construction: he clearly felt that once section 27 of the Wills Act, 1837, was applied to validate the exercise of a power by will the effect of the appointment should automatically be considered in accordance with English law since the power was created by an English instrument. This interpretation is supported by his reliance on the fact that section 27 was not applied in *In re Pryce*. Thus a difference between the approach of the learned judge and the views put forward in Dicey concerns the fundamental question whether the choice of law problem in these cases should be characterized as one of construction alone or whether it included issues relating to the essential validity of the power. The Dicey interpretation of the judgments in *In re Pryce* as being concerned with choice of law questions relating to essential validity is perhaps attractive in principle but it does not appear to be the view adopted by Danckwerts J. The learned judge appears to hold the view that, once a will has been established to which section 27 applies, no further reference need be made to the law of the domicile even when by English law the operation of the power is to mix the appointed fund with the testator's other assets and so to make it part of his own property.

Danckwerts J. also stressed the effect of the law of Holland on the will considered in *In re Pryce* as being a factor distinguishing that case from *In re Waite's Settlement Trusts*. This factor is not considered in the new edition of Dicey's *Conflict of Laws*. The learned judge appears to have had in mind the evidence that was given in *In re Pryce* that Dutch law would recognize the will not only as a valid exercise of the power but also as having the effect of making the appointed property part of the testatrix's assets and thus subject to Dutch *legitima portio* rules. In *In re Waite's Settlement Trusts*, on the other hand, the evidence concerning the law of Guernsey was to the effect that it would not recognize the residuary bequest as an effective exercise of the power. Thus in the former case both English and Dutch law had the same effect of rendering the appointed property part of the testatrix's assets while in the latter case this was not so and it was only under English law that any effect could be given to the exercise of the power. If this interpretation is correct it would seem that the learned judge treated *In re Pryce* not as an authority on choice

¹ [1916] 2 A.C. 231; 32 T.L.R. 456.

³ [1901] 1 Ch. 691.

⁵ Dicey, *Conflict of Laws*, 7th ed., pp. 641-4.

² [1909] 1 Ch. 20; 25 T.L.R. 44.

⁴ [1958] 1 Ch. 100, 109.

of law problems concerning essential validity but merely as an illustration of a case in which the law of the testator's domicile was applied to all questions relating to the exercise of a power of appointment, presumably as an alternative to a similar application of English law to all questions concerning that power by virtue of section 27 of the Wills Act, 1837. Such a view might be criticized on the ground that there is no absolute necessity to refer both the question of the effect of execution and the question of the application of restrictions on testamentary capacity to the same law. English law might be applied to reach the conclusion that the power was exercised in such a way as to make the appointed property part of the testator's assets and the law of domicile then applied to limit the extent to which the testator had the free disposition of those assets. Indeed, this attitude would be more consistent with the general rules relating to the validity of testamentary dispositions than that adopted by Danckwerts J. in the instant case. It appears to have commended itself to Buckley L.J. in *In re Pryce*.¹ However, his comments on this matter were *obiter dicta* since, although it is not clear whether the Court of Appeal was applying English or Dutch law in that case, the result did not depend upon the reference of the two questions distinguished above to two separate systems of law. For this reason it is suggested, with respect, that the major criticism of *In re Waite's Settlement Trusts* is not that it is indistinguishable from *In re Pryce* but that it is inconsistent with the general rules relating to the validity of testamentary dispositions.

This inconsistency can only be justified if one accepts the distinction drawn by Danckwerts J. between property and power—a distinction criticized by the learned editor of Dicey on the ground that it 'lacks substance when the power is general and the donee can make himself the owner of the property by a stroke of the pen'.² This is the third reason for which it is submitted in Dicey that *In re Waite's Settlement Trusts* was wrongly decided. If the distinction between property and power is of no importance then another distinction must be drawn, as in many circumstances it is drawn, namely, that between general and special powers. In the field of the conflict of laws, however, there seems to be a general lack of consistency on this point. Thus the learned editor of Dicey's *Conflict of Laws* himself maintains that no such distinction is likely to be drawn by the English courts in the context of rules relating to testamentary incapacity and that both special and general powers can be exercised by will even if the law of the testator's domicile renders him incapable of making a will.³ On the other hand, the same authority supports a general rule that testamentary capacity is governed solely by the law of the testator's domicile at the time at which the will was made.⁴ Thus in this respect at least general powers and property do not seem to have been equated. The fundamental question is to determine the extent to which general powers should be governed by the same rules as ordinary rights to property. While one would agree with the learned editor of Dicey that there are considerable arguments in favour of equating general powers and property in a number of instances neither the cases nor the commentaries thereon give very clear guidance as to the principles which establish the circumstances in which such equation should take place. *In re Waite's Settlement Trusts* may be said to have raised the issue but not to have contributed any statement of general principle which might fulfil this need.

Finally, it may be pointed out that Danckwerts J. was probably justified in refusing to follow *In re Lewal's Settlement Trusts* though his reasons for doing so are not altogether clear. The case can be distinguished from *In re Waite's Settlement Trusts* since the testatrix's testamentary capacity only existed by virtue of French law and was therefore necessarily limited in accordance with that law.

P. B. CARTER

¹ [1911] 2 Ch. 286, 299-300.

³ *Ibid.*, p. 631.

² *Op. cit.*, 7th ed., p. 643.

⁴ *Ibid.*, p. 600.

REVIEWS OF BOOKS

The Development of International Law by the International Court, being a revised edition of *The Development of International Law by the Permanent Court of International Justice* (1934). By SIR HERSCH LAUTERPACHT. London: Stevens & Sons Ltd. 1956. xix+408 pp. £3. 3s. od.

THIS is neither a treatise on the organization and procedure of the International Court of Justice nor a systematic digest of its decisions on substantive points of law; it is something far more valuable than either as a contribution to the future development of international law and organization, namely, an appraisal of the international judicial process as a factor in the development of the law. It might appropriately have been called 'The Nature of the International Judicial Process' and, though it differs from Cardozo's lectures in having now grown from a mere stimulating essay into a full treatise supported by a wealth of detailed illustration, one may reasonably hope that it may have an influence comparable to that which has been exercised by Cardozo on modern thought concerning the process of judicial decision in municipal law.

Sir Hersch Lauterpacht has qualifications of an altogether exceptional order for attempting so difficult a task. *Private Law Sources and Analogies of International Law*, 1927, was a pioneer study, and remains the authoritative evaluation, of the significance for the evolution of the international judicial process and development of international law of the adoption in Article 38 (1) (c) of the Statute of the Permanent Court of International Justice of 'general principles of law recognised by civilised States' as a source of decision in the judicial settlement of international disputes. *The Function of Law in the International Community*, 1933, remains, after a quarter of a century, the outstanding theoretical study of the international judicial function and its place in the settlement of international disputes. As editor of the *Annual Digest* and *International Law Reports* for a period now covering nearly forty years, Sir Hersch has amassed a unique knowledge of the content of judicial decisions, national and international, on questions of international law. As a Judge of the International Court since 1955, he has taken a bold and courageous line in putting to the test of practical application his concept of the scope and responsibilities of the international judicial function. Every student of international law will be grateful that he has not felt inhibited by his election to membership of the Court from publishing the present work which had been substantially completed before his election and does not comment on any decision of the Court since his election.

The present volume has grown out of a course of lectures on 'The Development of International Law by the Permanent Court of International Justice' delivered at the Graduate Institute of International Studies in Geneva in 1934 and published as essays later in the same year. No one who heard the original lectures can forget their freshness and the memorable reception which they received from the sophisticated audience which frequented Geneva in those days and the present reviewer must be only one of many who have found them a source of constant stimulus during the intervening years.

The learned author presents his conclusions in five parts corresponding to the chapters of the 1934 volume which he describes as 'The Law Behind the Cases', 'Judicial Caution', 'Judicial Legislation', 'The Effectiveness of the Law' and 'The Court and State Sovereignty'. Some may feel that this arrangement, which was entirely

appropriate in a course of lectures presented as an essay, tends to become somewhat artificial at places in the present comprehensive treatise, particularly in the antithesis between judicial caution and judicial legislation, but the author might well reply that it has the advantage of preserving continuity with the original edition, that any alternative arrangement might well be equally artificial, and that the arrangement is in any case of secondary importance for the development of his theme and its variations. The antithesis between judicial caution and judicial legislation, moreover, while somewhat artificial as an arrangement of the discussion of particular cases, throws into sharp relief a fundamental dilemma of judicial method.

Under the title 'The Law Behind the Cases', Sir Hersch discusses the role of the Court as an agency of pacific settlement and an agency for the development of international law. He rightly insists that neither the fact that the majority of the cases which have come before the Court have arisen out of a disputed interpretation of a treaty, nor the fact that most of the contentious cases have arisen out of rights of private individuals, nor the relative preoccupation of the Court with pleas to its jurisdiction and disputed questions of fact, justifies the impression that the significance of the work of the Court for the development of the law is of limited compass. The occasions for many of the pronouncements of the Court may have been of secondary importance, but this has not impaired the value of the pronouncements themselves as a weighty contribution to the development of the law. Among the passages in this discussion of international judicial technique which the present reviewer has found of special interest are that concerning the practice of the Court in respect of the citation of international judicial and arbitral precedent, that elaborating the thesis that exhaustiveness in judicial reasoning is essential to promote full confidence in the decisions of an international court or tribunal, and that reviewing the justification for and proper limits of dissenting opinions.

Some of the illustrations of judicial legislation mentioned give a revealing picture of the part already played by the Court in the constructive development of the law. They include the adoption, in the *Iraq Boundary* case, of the principle *nemo iudex in re sua*; the recognition, in the *Certain German Interests in Polish Upper Silesia* case and the *Free Zones* case, of the doctrine of abuse of rights; the assertion in the *Chorzów Factory* case that any breach of an international engagement involves an obligation to make reparation; and the recognition in the *Jurisdiction of the Courts of Danzig* case that individuals may be subjects of international law, followed by the similar recognition in the *Reparation for Injuries* case of the legal personality of the United Nations *erga omnes*.

There are three sections of the volume, the chapter dealing with preparatory work in the interpretation of treaties and the parts devoted to the principle of effectiveness in the interpretation of treaties and to the Court and State sovereignty, which, in addition to throwing important light on the general theme of the volume, are in effect monographs on questions of major importance.

In his discussion of the question of preparatory work in the interpretation of treaties, the learned author reduces both the essentials of the matter and its judicial history to refreshingly simple and convincing terms. It is, he concludes, 'contrary both to principle and practice to exclude preparatory work altogether' but 'the fact remains that the actual text of the treaty and not the contents of the negotiations preceding it express the will of the parties'; 'the nature of the treaty-making process necessitates, in the matter of preparatory work, a solution which lies half-way between the finality of the text and the indiscriminate use of preparatory work'. This represents the position which the Court now appears to have reached.

'The Permanent Court of International Justice showed little inclination to act rigidly on the assumption that the Treaty in any particular case is so clear as to render recourse to or study of *travaux préparatoires* inadmissible or otiose. The International Court of Justice in the first phase of its activity—as evidenced in the Advisory Opinion of 1948 on *Conditions of Admission to Membership in the United Nations* and in the Advisory Opinion of 1950 on the *Competence of the General Assembly for the Admission of a State to the United Nations*—was content to assume that the plain and natural meaning of the relevant clauses precluded recourse to *travaux préparatoires*. It may be noted that in the latter case there were unusually strong grounds for a conclusion of that nature. In the former case, a weighty Dissenting Opinion effectively cast doubt on the ruling of the Court that the text of the Treaty was so clear that there was no occasion to have recourse to preparatory work. Cases decided subsequently suggest a modification of that attitude inasmuch as the Court, in actually examining the preparatory work leading to the conclusion of the texts before it, has tended to adhere to the true substance of the practice of the Permanent Court of International Justice and to what is believed to be a sound principle of interpretation of treaties.'

In connexion with the principle of effectiveness, Sir Hersch discusses in turn its application to cases relating to territorial settlements and the acquisition of territory; its bearing on provisions conferring jurisdiction; the effectiveness, in fact as well as in law, of clauses providing for equality of treatment; and the effectiveness of international institutions and international organization. In this last context, he reviews the contribution made by the Court at successive stages of its work to the constitutional development of the International Labour Organization, the League of Nations and the United Nations, and discusses the implied powers of the United Nations. While regarding the principle as 'an instrument of considerable potency' which may 'be as comprehensive as all the rules of interpretation taken together' and frequently 'renders unnecessary any recourse to subsidiary sources of law' the learned author is careful to draw attention to the limits of its application.

'At the same time it must be borne in mind that the principle of effectiveness is only one of the standards of interpretation; that its function as an instrument designed to assist, in accordance with good faith, in giving effect to the intention of the parties must not be permitted to displace such intention; and that it ought not properly to be allowed to degenerate into a rule of thumb as distinguished from a flexible, critical and discriminating guide to interpretation. . . . As stated, in essence it is no more than a requirement of good faith. But good faith requires no more than that effect be given, in a fair and reasonable manner, to the intention of the parties. This means that on occasions, if such was the intention of the parties, good faith may require that the effectiveness of the instrument should fall short of its apparent and desirable scope.'

The discussion of the manner in which the Court has approached the conflicting claims of sovereignty and law was one of the most stimulating passages in the original 1934 volume, in which the subject was dealt with in 20 pages, and has been developed in the present volume into a masterly survey of the whole subject which runs to 104 pages. The ground covered is best summarized in the author's own words:

'... in a considerable number of cases the Court, in interpreting international law, has been in fact confronted with a choice between the principle of the minimum of restrictions upon the sovereignty of States and giving full effect to what appears to be the purpose of the obligations binding upon or undertaken by them. We have seen that the result of that choice has been such that the jurisprudence of the Court in this sphere can to a large extent be conceived in terms of a restrictive interpretation of claims of State sovereignty. It is sufficient to recall the rejection of the rule of absolute unanimity in the

interpretation of the Covenant of the League of Nations; the cases of affirmation of the competence of the Court through a bold interpretation of jurisdictional clauses, the assumption of an implied submission by the parties and the disregard of requirements of form; the interpretation of Minorities Treaties in favour not of States but of the system of protection of minorities, and, generally, the construction of clauses providing for equality of treatment in a manner calculated to secure their observance not only in law, but also in fact; the wide interpretation of the scope of the competence of the International Labour Organization and of other international organs such as the International River Commissions; the recognition of the prohibition of abuse of rights; the pronouncements confining within its proper scope the exception of domestic jurisdiction both under Article 15 of the Covenant of the League of Nations and elsewhere; and the emphasis upon the superiority of international obligations over municipal law.⁷

The Court has exhibited the same attitude to some of the traditional claims and emanations of sovereignty more directly in a variety of ways, for instance,

'by discouraging undue reliance on restrictive interpretation of treaties; by stressing the obligations of sovereign States in the matter of State succession; by admitting the possibility of treaty rights extending to non-parties; by recognising the propriety of extending the obligations of general treaties to States which are not parties thereto; by rejecting the plea that the application of national legislation to aliens and nationals alike constitutes a sufficient justification for the avoidance of international obligations; by framing the law relating to damages in accordance with general principles and not with the claims of the sovereign State to a more restrictive assessment of the duty of compensation; by denying or confining within narrow limits the traditional claims of the State to full freedom of action in cases of self-preservation, necessity and intervention as well as with regard to reservations to treaties; by treating sovereignty not as an absolute but as functionally and otherwise divisible and separable; and, finally, by subjecting to the rule of law such collective sovereignty of States as is embodied in the General Assembly of the United Nations.'

The principal reasons which have shaped this attitude 'stem, in the main from the overriding fact that while the law, in its ultimate result and purpose, protects the freedom—in the international sphere, the sovereignty and independence—of those subject to its sway, it does so at the same time by subjecting them to its restraints and obligations'. Nevertheless, 'the fact that sovereignty is in many respects part of international law' implies that the Court has an obligation, which it respects, to give effect to rights of sovereignty recognized by the law. In respect of certain quite vital matters, notably the bearing of the freedom of action of sovereign States on 'the creation and judicial recognition of binding customary international law', the existing jurisprudence of the Court, as represented by the *Lotus*, *Fisheries* and *Genocide* cases, may well be regarded (though Sir Hersch, in his extended discussion of these cases, is careful not to say so) as raising more questions than it solves.

Conscious of the obligation of judicial restraint and reticence, Sir Hersch is consistently guarded in his conclusions and scrupulous in stating fully and fairly every side of every controversial issue. Others are at liberty to speculate more freely. The present reviewer has been impressed in the course of reading the volume by a number of queries concerning the present jurisprudence of the Court which would appear to be of crucial importance not merely for the future of international adjudication but for the future of international law itself.

One salient impression is that, while the first four decades of authoritative international jurisprudence have given us an imposing body of precedent on a significant range of issues and the elements of a far-sighted international judicial technique, the

future is still far from being assured. There remains a wide freedom of choice both as regards questions of substantive law and procedure and in respect of the fundamentals of judicial method. The learned author repeatedly draws our attention to cases which may be regarded as qualifying each other. As illustrations we may mention the *Eastern Carelia* case and the *Interpretation of Peace Treaties with Bulgaria, Hungary and Roumania* case as regards the validity of a request for an advisory opinion made without the request of a party concerned; the *Panevezys-Saldutiskis Railway* case and the *Reparation for Injuries* case as regards the nationality of claims; the *Interpretation of the Treaty of Lausanne (Irak Boundary)* case and the *Reservations to the Genocide Convention* case as regards the principle of unanimity; the *Corfu Channel* case and the *Anglo-Iranian Oil Co.* case as regards *forum prorogatum*; the *Phosphates in Morocco* case and the *Electricity Company of Sofia* case, as regards the reservation of 'past disputes' from the compulsory jurisdiction of the Court; and a whole series of cases as regards recourse to preparatory work for the interpretation of treaties. It is, of course, of the essence of case law that succeeding precedents qualify each other and there are many analogies in municipal experience, particularly in the field of constitutional law in countries where constitutional matters frequently come before the Courts, for situations in which there is wide scope for judicial discretion in determining which of a number of principles and precedents which qualify each other are to be regarded as applicable to the particular case. Every judicial system is continually remaking its traditions and jurisprudence. But the matter is of particular importance in the present stage of development of international adjudication and international law. It is both significant and reassuring that, in the main, modifications in what appears to be the original attitude of the Court have been in the direction of bringing its decisions into closer correspondence with the contemporary progress of international law. In such a situation problems of judicial method become, however, of primary significance. Sir Hersch has symbolized the recurring dilemma of the Court in his contrast between judicial caution (which includes judicial restraint, judicial hesitation and the appearance of judicial indecision) and judicial legislation.

In exercising constantly a choice between conflicting principles and, to some extent, conflicting precedents, the Court is naturally influenced by the imponderables of successive cases which include its evaluation of the weight to be attached at the time and in the circumstances of the case to certain considerations of international public policy. What part such considerations play and how far they operate consciously or unconsciously is necessarily conjectural and is a matter on which opinions may well differ. But it is difficult to reject completely the hypothesis that the opinion of the Permanent Court of International Justice in the *Eastern Carelia* case in 1923 was influenced by its reluctance, at a time when its advisory jurisdiction was a factor in the attitude of the United States towards possible participation in the Statute of the Court, to assume advisory jurisdiction without the full assent of States which might be affected thereby; when the *Interpretation of Peace Treaties with Bulgaria, Hungary and Roumania* case came before the International Court of Justice in 1950 no similar ground for hesitation existed. Similarly, the somewhat far-reaching rejection in the *International Commission of the River Oder* case of 1929 of published preparatory work on the ground that some of the parties to the case had not participated in the negotiations may well reflect a 1929 attitude towards the method of negotiation of the 1919 peace settlement. In like manner the opinion in the *Genocide* case gives one the impression of being less concerned with the law of reservations as such than with genocide as a human and moral problem, arising from the evils of the Second World War, the nature of which led the Court to adopt as the inarticulate major premiss of its decision the desirability

of securing the widest possible participation in the Convention on the subject. Or again, in the *Anglo-Norwegian Fisheries* case, the 'felt necessities of the time' to which, in the tradition of Mr. Justice Holmes, the Court responded are perhaps to be found in the complex of economic and strategic considerations and difficulties confronting a small, exposed, relatively barren and valiant land. None of these considerations are in any sense improper; they are indeed all vital if the law is to keep in constant touch with life; but they emphasize the need for the highest order of judicial statesmanship in reconciling the claims of the authority and stability of the law as an essential element in any legal system with the considerations of public policy which no progressive legal system can afford to ignore.

The problem becomes particularly acute in cases in which the essential issue is how far the Court is prepared to attribute universal validity as evidence of custom to generally accepted practice.

'In few matters', the learned author writes, 'do judicial discretion and freedom of judicial appreciation manifest themselves more conspicuously than in determining the existence of international custom. The number and the importance of the States whose participation is necessary for the creation of custom; the presence of the conviction that the conduct in question is followed as a matter of legal obligation; the degree of relevance, in a particular situation, both of protest and of absence thereof; the determination whether the express adoption in treaties or otherwise of particular rules is expressive of existing or growing custom or whether the fact that the explicit adoption of such rules was deemed necessary points to the absence of custom—with regard to all these questions there are no clear limits to the comprehensiveness of judicial freedom of appreciation. . . . What is, in the language of Article 38 of the Statute, the degree of the requirement of generality of the 'practice accepted as law'? To what extent is it accurate to maintain that sovereign States can be held bound by implied consent only under the irresistible impact of universal and not merely general acceptance of what are considered to be rules of law? Do departures from general practice, or claims inconsistent therewith, deprive such practice of its quality as binding custom not only in relation to the State or States departing from or objecting to that general practice, but absolutely? To what extent does it lie with one sovereign State—or a small number of them—to decline to be bound by general custom for the reason that it, or they, have refused assent to it?'

The answers which the Court ultimately gives to these questions will in large measure determine the future of international law in an age when far-reaching changes in the composition of and distribution of influence within the international community have introduced so much uncertainty. The *Lotus* case, the *Reservations to the Genocide Convention* case, the *Anglo-Norwegian Fisheries* case, and the *Rights of Nationals of the United States in Morocco* case, in all of which there were powerful dissenting opinions, may call for further consideration in this general perspective. One may reasonably hope that more frequent recourse to international adjudication will tend to settle rather than unsettle the law but an over-cautious attitude towards the judicial reception and recognition of custom may have the reverse effect. In this connexion the determination of *opinio necessitatis juris* may be of decisive importance. As Sir Hersch remarks:

'Unless judicial activity is to result in reducing the legal significance of the most potent source of rules of international law, namely, the conduct of States, it would appear that the accurate principle on the subject consists in regarding all uniform conduct of Governments (or, in appropriate cases, abstention therefrom) as evidencing the *opinio necessitatis juris* except when it is shown that the conduct in question was not accompanied by any such intention. The Judgment in the *Asylum* case is not inconsistent with some such approach. The solution may not be altogether satisfactory, but it is probably more

acceptable than the alternative method of exacting rigid proof of the existence of international customary law in a manner which may reduce to a bare minimum its part as a source of law. Of this, the decision in the *Lotus* case, discussed below, provides an interesting example. While it is impracticable to demand positive proof of the existence of legal conviction in relation to a particular line of conduct, it is feasible and desirable to permit proof that in fact the *opinio necessitatis juris* was absent.'

A related problem arises when the Court hesitates or declines to consecrate with its authority a widely accepted principle or practice which it regards as calling for some modification in the light of contemporary needs. As illustrations we may take its unwillingness in the *Fisheries* case to recognize the existence of a general rule of international law prescribing that the base-line of territorial waters must follow the sinuosities of the coast or of such a rule laying down a ten-mile limit for the base-line of territorial waters in the case of bays, and its unwillingness in the *Genocide* case to recognize the rule that the unanimous consent of all signatories of a treaty is required for the validity of a reservation appended by a State desirous of becoming a party thereto. One can appreciate and share the desire to avoid petrifying legal rules which may have originated in circumstances which no longer exist or are rapidly changing, and the principal judicial organ of the United Nations and of the international community generally clearly has a special responsibility to be permanently conscious of new trends and tendencies and future needs in determining the law. Only a short generation ago there was virtual unanimity among progressive international lawyers in regarding peaceful change as the crucial problem of international law and international organization. Such far-reaching changes have now occurred, largely as the outcome of forces released by war but in many cases peacefully as between the parties directly concerned, that the emphasis of the problem has changed and we are less concerned to insist that provision for peaceful change is indispensable than to seek for a minimum of stability and continuity in a world with an unprecedented rate of change. In this context the Court may be called upon to choose between lending its authority to a widely accepted rule which no longer corresponds fully to contemporary needs and declining to recognize the binding force of such a rule at the price of lending its authority to the view that there is no clear rule of law on the subject and States are free to act in their discretion in the matter. Any such choice clearly calls for the broadest statesmanship. If the first alternative is chosen we have, in respect of the matters at issue, to live with a body of law no longer fully appropriate to contemporary needs, until we can secure an agreed change in the law; if the second alternative is chosen we have to live with a degree of uncertainty ranging, according to circumstances, from inconvenience through confusion to chaos, until we can secure agreement on a generally acceptable rule of law. The dilemma clearly does not permit of an unqualified answer either way. The weight to be attached to the conflicting factors to be evaluated may differ from case to case. But it is important that they should be instinctively recognized and should be evaluated with detachment and vision. When the dilemma is resolved in favour of the continuing legal validity of a rule which calls for change the Court may think it legitimate and appropriate to act upon a suggestion made by Sir Hersch that its duty to apply the law 'may not be incompatible with an expression of view as to the inadequacy of the law thus applied and the resulting moral duty of the parties—especially the successful party—to agree to, as good members of international society and in a spirit of neighbourliness, or to embark by common effort upon, such modifications of the law as appear necessary'. Such expressions of view by a court are not uncommon in municipal legal proceedings, and while there may be cogent reasons for the International Court acting with special restraint in drawing attention to the

desirability of a change in the law such a practice may be preferable to the widespread uncertainty which may be created by a refusal to enforce the rule which the Court regards as outmoded.

Crucial as these outstanding problems are, a healthy preoccupation with them must not be allowed to obscure the vital importance of what has already been achieved, and is being further consolidated year by year, by the progressive substitution of international judicial precedent for formless and debatable custom. In depicting the contribution which the Court has already made to the development of the law and reviewing the problems of judicial method and craftsmanship which will affect so decisively its future contribution, Sir Hersch has rendered still another immense service to the contemporary progress of international law.

C. W. JENKS

British Nationality Law. By J. MERVYN JONES. Oxford: Clarendon Press. 1956. xxvii+306 pp. 45s.

Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland. By CLIVE PARRY. London: Stevens & Sons Ltd. 1957. liv+1021 pp. £6. 6s.

The late Dr. Mervyn Jones's now well-known and then largely pioneering book, *British Nationality Law and Practice*, was published in 1947. The statement that *British Nationality Law* is a second edition of that work calls for obvious qualification for an obvious reason. The British Nationality Act, 1948, came into force on 1 January 1949. The author likens his fate to that which overtook the writer on the land law on 1 January 1926. The British Nationality Act can indeed be said to have effected a revolution. Before 1949 the dominant notion in the common law as modified by various statutes was that of allegiance. Now British nationality law has been placed upon a purely statutory basis in which allegiance is 'a consequence, or concomitant, not a source' of nationality. Not only has the law become statutory but it has finally ceased to be an exclusively United Kingdom law. Since the passing of the Statute of Westminster in 1931 there has been no doubt that power to alter the old common code of British nationality law is legally not confined to the Parliament of the United Kingdom. The phrase 'common code' was already a misnomer. Now that common code has ceased to exist. As Mervyn Jones succinctly points out, 'British Nationality now has no meaning apart from citizenship of a Commonwealth country, each of which is a sovereign state, yet none of which is "foreign" to the others.'

The book is divided into four parts and has thirteen appendixes. The first part concerns the nature of nationality and its place in international law. This latter topic assumes naturally greater importance in this edition as a result of the emergence of nationality in a full sense in Commonwealth countries. Part II is entitled 'Evolution of British Nationality Law'. Considerable pruning has taken place here. This difficult but necessary task has been admirably performed. Part III is on Commonwealth citizenship. The first section on the Common Status is brief and lucid. The author explains the submergence of the old common code in practice and in law and gives a bird's-eye view of the new Commonwealth citizenship scheme. This is perhaps in many ways one of the best parts of a good book. The second section contains a somewhat disjointed discussion of Commonwealth citizenship legislation. A more comprehensive commentary upon the 1948 Act constitutes the third section. (The Act itself is set out in

Appendix 7.) Part IV deals with British nationality and protection in international law. The first Appendix is a ten-page summary of the law in force in the United Kingdom and colonies on 31 December 1948. For a fuller treatment of this the reader must still be referred to Part III of *British Nationality Law and Practice*. That the new book is complementary to, and not a replacement of, its predecessor is nowhere more clear than here.

Dr. Clive Parry's new book is large, but in one way misleadingly so. A considerable amount of space is taken up by the setting out in large and generously spaced type of the nationality legislation of the United Kingdom, other Commonwealth countries and Eire. Some readers would probably prefer a compression of this over-spacious layout.

The general plan of the book is simple. The introductory Part I deals with the legal nature of nationality, gives a survey of the history of British nationality law down to the present day, and discusses international aspects of British nationality and Commonwealth citizenship. Parts II, III and IV deal in turn with the laws of the United Kingdom and Colonies, Canada, Australia, New Zealand, South Africa, Southern Rhodesia, Ceylon, India, Pakistan and Eire. Part II includes treatment of the status of British Protected Persons and of citizenship of the Federation of Malaya (Chapters 7 and 8 respectively). In dealing with individual countries, the author gives an historical survey leading into an exposition of the present law and sets out earlier statutes. This is followed by fully annotated texts of the relevant modern statutory material. The annotation takes mainly the form of comment and, where apt, illustration.

Dr. Parry's treatise is clearly the result of a great deal of industry. The table of cases comprises more than 200 entries (Mervyn Jones lists only 31). The tables of Statutes and Statutory Instruments together fill twenty-four closely printed pages. The book provides a very comprehensive treatment of the nationality laws of countries dealt with. There can be little doubt that it will take its place as the standard practitioner's work on the subject.

The publication of two books on the same subject in successive years might seem to invite comparison. It is, however, only in a very limited way that this is so in the present case. *British Nationality Law* and Dr. Parry's treatise are essentially different. To generalize, the former is an academic essay, the latter a practitioner's *vade mecum*. Part I of Dr. Parry's work has, of course, the academic flavour which the topics dealt with therein largely require. But this Part occupies only 142 out of some 1,000 pages. Viewed as a whole, this book is a practical examination of the present law. It is as a collection of all relevant statutes, most fully annotated, that it will have special value. The legislative enactments are relentlessly scrutinized and the difficulties to which they may give rise are imaginatively considered.

A practitioner's book must be up to date. The precise moment at which Dr. Parry's treatise states the law is not altogether clear. Many events of the first quarter of 1956 at least are covered. This uncertainty is, of course, excusable in a work which is concerned with activities of so many legislatures. What is important is that the supplementary service, already announced, should be of adequate frequency. Ghana and Malaya have already become independent: the Federation of the West Indies is evolving: the British Nationality Act, 1958, is already on the statute book and part of it came into force on 20 February 1958.

The late Dr. Mervyn Jones's book is made particularly attractive by the author's great capacity to see the wood for the trees and by his gift of tersely lucid exposition. It is an excellent introduction to the subject. It may be noted that, although viewed as a whole it is to British nationality law that it is such an introduction, Part I is itself a compressed but very good introduction to nationality in international law. But the

book is more than merely an introduction: it is a distillation of the results of a learned author's considered reflections upon a difficult subject. As such it will stand reading and re-reading even by those not unversed in nationality law. The 'academic' Part I of Dr. Parry's treatise seems to the present reviewer to be the result of scholarship which, although painstaking, is more discursive. Tastes and opinions may differ; but the present reviewer can do no more than record that, generally speaking and not without exceptions, he found Mervyn Jones's book more illuminating and more stimulating than this part of Dr. Parry's treatise.

In conclusion, it is as no mere formality that he mentions the high quality of the physical production of both books.

P. B. CARTER

Aggression and World Order. A Critique of United Nations Theories of Aggression. By JULIUS STONE. London: Stevens & Sons Ltd. 1958. Pp. xiv + 226. 30s.

The distinguished author of *Legal Controls of International Conflict* devotes this much smaller volume to a very thorough and perhaps passionate examination of the specific problem of aggression which is only incidentally treated in the larger volume. Though it may well have been written under the impact of the Middle East Crisis 1956-7, this is no *pièce d'occasion*. It is a thoughtful, closely reasoned and broadly based analysis of the concept of aggression, whether and how it might be defined, and what role, if any, it might serve, whether defined or undefined, in the peace enforcement system of the United Nations. The efforts of the League of Nations and the United Nations to define it and the alternatives of defining—abtract, enumerative, mixed, logical and legal—are critically reviewed. Having clarified many ambiguities, the author then proceeds to an examination of the prohibition of the use of force in the Charter and relates various types of definition to the power interests of the Soviet Union and the Western States.

In contrast to the prevailing discussion which draws analogies between aggression and criminal law, the author points out that a more useful analogy exists between the notion aggression and the concept of due process in American constitutional law cases. One chapter is devoted to a discussion of the usefulness of a definition of aggression in connexion with individual responsibility in the present age when truth seems to have as many versions as there are nations. Finally, the author sums up his findings and relates them to the peace-enforcement function of the General Assembly. As there can be no book by Stone without a discourse, he provides one here on the subject of 'A United Nations Peace Force and the Authority of the General Assembly'. In an appendix some draft definitions of aggression are reprinted.

It may be well to state at the outset that Stone, like the rest of us, is against aggression in all its forms and his cutting critique of the persistent efforts to define this elusive concept should not be misunderstood as condonation. He does seem to hold, however, that it makes no sense to advocate the absolute prohibition of the use of force if no other means are available to a State in order to ensure its survival or redress a persistent and grievous wrong.

Stone's principal target is accordingly the position developed by Georges Scelle and others, according to which general international law as well as the Charter of the United Nations prohibit all use of force or threat of force except in self-defence or on behalf of or by the United Nations; that this is so despite the obvious and admitted fact that there is neither under general international law nor under the law of the United Nations

an effective enforcement of legal rights or a system for the effective redress of wrongs; that aggression must be defined in objective terms, operate automatically, and exclude all subjective elements; that considerations of justice or the merits of a conflict must therefore become legally irrelevant; and, finally, that aggression must be conceptually as well as operationally the focus of the peace-enforcement system of the United Nations.

The traditional efforts to formulate an enumerative or ostensive, an abstract or general, or a mixed definition are discarded. Passing to the level of theorizing, Stone distinguishes a logical and a legal definition of aggression. The former is matter of epistemology, the latter of statecraft. There is no reason why a definition of aggression should not be possible logically. Analytically four alternatives appear possible: first the possibility of a definition of aggression which is open neither at the inculcating nor at the exculpating end, that is, a definition which lists precisely and exhaustively the 'criminal' acts as well as the extenuating circumstances; secondly, a definition which is open at the inculcating but closed at the exculpating end; thirdly, one which is closed at the inculcating but open at the exculpating end; and fourthly, one which is open at both ends. The applicability of any of these alternatives will depend upon the precision of the definition which in turn will depend upon the precision of the terms employed in defining the various acts, &c. Generalizing, Stone argues that the greater the precision 'in the inculcating determinations, the less power is left to the (applying) organ, and the more chance there is that innocent acts in un contemplated situations will *prima facie* be unjustly branded as aggression. The more precision there is in the exculpating determinations, the less power in the organ, and this time the more likely that ingenious aggressors will use them as a cover for new forms of aggression' (p. 89).

Thus, while logically a definition along any of the four alternatives appears 'possible', it does not follow that it is also 'feasible' in the sense of being acceptable to or desired by a large number of States, including the Great Powers.

A legal definition, being a matter of statecraft, faces the graver obstacles arising 'from the compulsive need to build into a "feasible", "acceptable" and "desirable" definition of aggression, by way of a limiting concept, some kind of minimal substitute for the frequent lack in international law of any effective non-forcible redress for violations of legal rights, as well as of any means of legislative adjustment of the deepest conflicts of interest. The difficulties, in short, are primarily ethical, political and sociological, not logical.' Unless these basic difficulties are met, 'the search for a definition which is logically structured, as well as "feasible", "acceptable" and "desirable" will but continue its vain and endless course' (p. 91). Stone does not attempt to draft a definition which would satisfy such exacting standards, for he does not believe that the notion of aggression is at all essential for peace enforcement or that if it were, it would be acceptable to a substantial number of States.

It is crucial for the understanding of Stone's position that he does not interpret the Charter of the United Nations and particularly its Article 2, paragraph 4, as implying an absolute prohibition to use force or threat of force. The contrary view is not, as frequently asserted, self-evident, nor the only possible one, nor even correct. Relying chiefly on the preparatory work, and references in the Charter to justice, respect for obligations arising from international law and treaties, and the sovereign equality of States, he argues: 'It would be a strange application of such principles to require law-abiding Members of the Organization to submit indefinitely to admitted and persistent violations of rights' (p. 97). Coming close to admitting even preventive war in extreme circumstances, he questions whether a Member is 'bound by law to wait for its own destruction' (p. 100).

In writing this Stone may or may not have had in mind Israel's invasion of Egypt in October 1956. In any event he argues that an Organization which legally required of its members suicide or meek submission to murder by progressive strangulation 'could only become a protective shield for those States whose predatory and imperial interests could sufficiently realize themselves without the need for "armed attack" upon other Members' (p. 101). Western interests are peculiarly susceptible to injury by other States acting within their 'domestic jurisdiction' and without committing an armed attack within the meaning of Article 51. An extensive interpretation of Article 2, paragraph 4, would be acceptable if unredressed wrongs were exceptional, of such a nature as not to threaten the survival of States, and if some effective method were provided for 'vindicating rights, and effecting adjustment of the status quo so as to secure a tolerable level of justice' (p. 100). The United Nations does not provide such relief and accordingly it makes no sense morally, politically or legally to argue that resort to force is prohibited absolutely.

Is a definition of aggression desirable? Stone discusses this extensively in relation to the concept of substantive due process in constitutional cases. In passing judgments the courts are bound and have in practice reviewed what Stone calls the 'complex of facts and moral judgments' in order to determine whether the legislature has been 'arbitrary, unreasonable and capricious' (p. 122). There is a kinship between the notions of aggression and due process, and if this is so, as Stone believes it is, then the notion of aggression cannot be any more 'self-defining' than due process and it would serve no useful purpose to define it. In practice, by analogy to due process, application of the concept of aggression would require a consideration of the full 'fact-value complex' of the case, of all the inculpatory as well as the exculpatory factors, that is 'a full assessment in the light of the whole course of the State relations concerned, of the merits of each side of the dispute to which the resort to arms is a climax, including the proportionality of the reaction to the wrong' (p. 131). In short, the evaluation of the justice of the case becomes inescapable in this process. 'As with lack of "due process" so with aggression', says Stone, 'there is no escape from the duty of seeking just solutions; and the search for such solutions necessarily requires us to consider the full complexity of the situation which is to be judged' (p. 132).

In an age in which truth and justice are 'nationalized', and in a forum such as the Security Council paralysed by the veto, or such as the General Assembly dominated by 'self-centred' or bloc voting, the prospect of finding just solutions is not bright. It is sufficiently discouraging for Stone and he accordingly proposes the abandonment of the notion of aggression charged as it is with a moral stigma, and concentration on the neutral concept of breach of the peace.

For the Security Council the finding of a breach of the peace would be sufficient legal basis for any action it may be able to take. For the General Assembly there is no real need for a definition of aggression. A simple definition has not been attained and remains unattainable whereas a complex definition, requiring a minute weighing of the full 'fact-value complex', would inevitably delay needed action. Stone suggests that for the Assembly too the finding of a breach of the peace is sufficient basis of action. The immediate objective should always be arresting hostilities. In order to achieve the necessary co-operation of the Members, the parties in conflict should be assured that the Assembly will vigorously tackle the job of reducing 'the grievances of both sides to a minimum level of tolerable justice and national security' (p. 160). However, even this modest though sufficient objective will elude us unless Members change radically their voting behaviour and stop 'ganging up' on the Western countries; and unless, in the face of the common danger of extinction in a thermo-nuclear war, they find a way

to 'restrain the deeper intransigencies of national interests, postures, and bloc alignments, to a degree which is manifestly indispensable for common survival' (p. 174).

In the discourse on a United Nations peace force Stone argues that the establishment in 1956 of the United Nations Emergency Force was not unconstitutional because it is essentially an observer corps and not a peace-enforcement organ. The General Assembly has no power to create such an organ and could not confer this power upon itself by dint of a resolution. For the Assembly to create a peace-enforcement organ would require a constitutional amendment.

Stone's closely reasoned and broadly based analysis may well cause scholars, if not the General Assembly, to pause in their search for a definition of aggression. His positive suggestions and affirmations, however, are open to criticism. One of the least satisfactory though by no means most significant assumptions is that there is something which may be called an 'intuitive' concept of aggression. Referring to the branding as aggressors of Italy in 1935, the Soviet Union in 1939, of Communist China in 1951 and the conviction of some defendants in the Nuremberg and Tokyo trials, Stone claims that 'such clear cases were *ex hypothesi* cases where the varied intuitions of States were able to converge *ad hoc*, and where therefore criteria are unnecessary' (p. 20). Perhaps with the same cases in mind he also affirms that 'no one doubts that there are core situations of aggression as to which no debate is possible' (p. 86). With respect, a debate seems quite possible with respect to the Soviet Union and Communist China. It is doubtful whether the League of Nations undertook an examination of the full 'fact-value complex' of the Soviet-Finnish affair. And in the case of Communist China there was a good deal of doubt and debate and probably very little intuition though under some pressure the necessary majority emerged. On the other hand, in the Middle East affair of 1956-7 the Security Council first and the General Assembly next came very close to an 'intuitive' finding of the aggressor or the aggressors. In the Palestine conflict in 1948, however, intuition was conspicuous by its absence although in the view of some, including the Secretary-General of the United Nations, the Security Council faced a 'clear' case of aggression. No intuition guided the Assembly in dealing with the Soviet intervention in Hungary in 1956.

In the light of the experience of the United Nations, Stone's suggestion to base action on a finding of a 'neutral' breach of the peace rather than on the finding of morally reprehensible aggression, appears hardly persuasive. What advantage does it offer really? In the Korean affair the Security Council determined by resolution of 25 June 1950 that the armed attack upon the Republic of Korea '*constitutes a breach of the peace*'; the General Assembly, on the other hand, found by resolution of 1 February 1951 that Communist China, 'by giving aid and assistance to those who were already committing *aggression* in Korea and by engaging in hostilities against the United Nations forces there, has itself engaged in *aggression* in Korea'. Substitution of 'aggression' for 'breach of the peace' would seem to indicate that these terms may be used interchangeably and without any sharp distinction in their consequences. The reaction of the Members would probably have not varied greatly had the Security Council 'determined' at once that the North Koreans had engaged in 'aggression' and the action taken against Communist China would probably have not varied much if there had been a finding of 'breach of the peace'. The powers of the Council and the Assembly (under the Uniting for Peace resolution) are the same in either case. Furthermore, it surely cannot be part of Stone's argument that the finding of a breach of the peace requires any less than one of aggression an examination of the case in its full 'fact-value complex' to be followed by an objective evaluation of the grievances on both sides with due regard to the minimal requirements of justice. Yet in the case of Korea there is room for doubt whether

the Security Council's finding was based on a consideration of the full 'fact-value complex' and an impartial examination of all the grievances. It would seem that so minimal a requirement of justice as to grant the 'guilty' party a hearing (*audietur et altera pars*) remains still to be satisfied.

What is argued here is that there is no reason to assume that merely by shifting the finding from aggression to breach of the peace any progress in peace enforcement is likely to be brought about. It would appear more likely that should such a shift come about in the practice of the United Nations, there will be an insistent demand for defining the facts constituting or the facts which ought to constitute a breach of the peace. And it does not require much imagination to assume further that this search will very likely be pursued along the well-trodden paths of the efforts to define aggression. Equally, there would appear little ground for hoping that the breach of the peace would not soon acquire the same sort of moral stigma which now attaches to aggression.

Stone is generally on solid ground in advocating greater circumspection in weighing all the factors at both the inculcating and exculpating ends, a change in self-centred voting, greater emphasis on remedial action, and a surrender of full measure of national intransigence, justice and truth, in short, a reasonable measure of tolerance, so as not to endanger the survival of any Member of the United Nations. But one may ask: by what practical measures could and should such a minimal yet basic change of Members' attitude and behaviour be brought about?

L. GROSS

Cour de Justice de la Communauté Européenne du Charbon et de l'Acier: Recueil de la Jurisprudence de la Cour. Vol. I, 1954-5; Vol. II, 1955-6. Luxemburg, Villa Vauban. 293 and 465 pp.

These volumes contain full reports of the proceedings in thirteen cases before the Court of the Coal and Steel Community, published in conformity with Article 59 of the Statute of the Court. Their subject-matter is somewhat technical, concerned as the cases are with the detailed application and interpretation of the constituent instrument of the Community. They are nevertheless to be welcomed as an important contribution to the literature of international decisional law. It is understood that summaries of the cases they contain will appear in forthcoming volumes of the *International Law Reports*. This, too, is to be welcomed.

CLIVE PARRY

Festsache für Alexander N. Makarov: Abhandlungen zum Völkerrecht. W. Kolhammer Verlag. Stuttgart. 1958. Pp. viii+605. Price: DM48.

Alexander N. Makarov, born in Russia and in the year 1919 appointed Professor of International Law at St. Petersburg (or was it Leningrad?) University, came to Germany as a refugee in 1925 at the age of 37. From 1928 onwards he was closely connected with the well-known Institutes which for many years have been the centres of international studies in Germany. He became a Professor of Law at Tübingen in 1948 and at Heidelberg in 1956 and a Doctor of Laws (*honoris causa*) of Hamburg University in 1949. On the occasion of his 70th birthday in August 1958 it was in Germany that no less than two *Festschriften* were published in his honour. Such recognition of achievements is rare. It does credit to those whose devotion, generosity and energy rendered it possible. It is also a particularly satisfying experience in the case of a man whose life has been spent in the serenity of academic research, who has never even tried to assert

himself otherwise than through his work, whose status rests on nothing but merit. His interests have always been diverse: international law and affairs in Russia, the law of nationality, comparative law, public and private international law—these are the fields to which he has contributed so much that the list of his publications extends over eleven printed pages. He does not appear to have published anything in the English language, but there must be a number of specialists in English-speaking countries who are conversant with his more important writings and for whom it will be a pleasure to see scholarship being acknowledged.

The volume here reviewed includes twenty-six contributions. Four of them (Ballreich, 'Die Europäische Atomgemeinschaft'; Jaenicke, 'Der überationale Charakter der Europäischen Wirtschaftsgemeinschaft'; Morelli, 'La Cour de Justice des Communautés européennes en tant que juge interne'; Schüle, 'Marktinterventionen der Hohen Behörde und finanzielle Einrichtung') deal with the joint economic institutions which in recent years have sprung into existence on the Continent. Professor Mosler, Heidelberg, also gives special consideration to them, when discussing, in general terms, the problem of admission to international organizations. Professor Andrassy, Zagreb, and Professor Guggenheim, Geneva, treat, respectively, of aspects of the International Court's jurisdiction and the scope of 'preliminary objections'. The law of nationality, the development of which owes so much to Makarov, forms the subject-matter of articles by Cavaré, Münch, Parry, Schneider and Strebel. Professor Scheuner, Bonn, supplies a very useful survey of the law relating to a Security Force employed by the United Nations, while Professor Schlochauer, Frankfurt, adds observations on revisions of the Charter. A paper by Professor Gidel on the 'Continental Shelf' deserves the specialist's particular attention and Professor Wehberg throws much new light on Conciliation Commissions. Among the remaining contributions by Giraud, Erich Kaufmann, Hans Kelsen, Hans-Joachim von Merkatz, Ellinor von Puttkammer, Gabriele Salvioi and Verdross it is, above all, the last-mentioned author's discussion of Austrian neutrality and its legal implications which should be brought to the reader's attention.

The English reader, however, is likely to be primarily interested in the four contributions written in the English language. The first is by Dr. Hambro who asks whether the membership of the International Court should be enlarged—a question which, as he admits, 'is not strictly speaking a legal, but a political one'. Dr. Jenks raises the important problem whether and to what extent it is open to States in the industrial life of which collective agreements play a large role, in effect to ratify a Convention by the inclusion of its provisions in collective agreements rather than by legislation. The author surveys the practice and experience of the last forty years or so and arrives at the conclusion that the solution of the problem which constitutes 'a major challenge to the constructive ingenuity of both international and industrial lawyers' should be approached in 'an experimental temper'. Dr. Clive Parry refers to Article 1 of the International Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930, which provides that 'it is for each State to determine under its own law who are its nationals' and that 'this law shall be recognised by other States in so far as it is consistent with international conventions, international custom and the principles of law generally recognised with regard to nationality'. It is the purpose of Dr. Parry's article to ascertain the existence and extent of the duty of recognition so imposed. He concludes (p. 360) that any such duty is 'an imperfect and eccentric one', and regards it as 'a tenable thesis that it does not exist at all or that, in so far as it must be taken to have been imposed by the Hague Convention of 1930, upon the parties thereto, it has no meaning'. The author's close reasoning is so persuasive that, notwithstanding its

somewhat startling character, one may find it difficult to disagree with his suggestion. But the question remains whether Article 1 does not also contain a negative duty, which may be full of meaning. Finally, there is a highly original contribution by Professor Verzijl, Utrecht, on the relevance of public and private international law respectively for the solution of problems arising from the nationalization of enterprises. He emphasizes, perhaps somewhat unduly, the distinctions in the character and scope of public and private international law and suggests solutions, based on these distinctions, of many practical problems which have arisen in recent years. Among his stimulating, though sometimes unconventional, observations one will note with satisfaction the author's firm assertion that a municipal Court is at liberty to inquire into the legality of foreign nationalizations in the light of public international law as well as the nationalizing State's municipal law. Dutch courts are probably the only continental courts which have subscribed to Anglo-American pronouncements allegedly requiring the sacrosanctity of the foreign act of State. The rejection of that doctrine by a Dutch authority of Professor Verzijl's standing will be welcomed by many.

F. A. MANN

Fundamental Problems of International Law: Festschrift für Jean Spiropoulos. Bonn: Schimmelbusch & Co. 1957. xxxi + 471 pp.

This volume is published in honour of the thirtieth anniversary of Professor Spiropoulos's entry upon the academic career. It contains papers by thirty-six scholars in various languages. Thus Dr. Andrassy writes of the individual in humanitarian international law and Judge Badawi gives an historical account of the international status of the Suez Canal. Madame Bastid returns to a theme she has made peculiarly her own—the internal law of international organizations. Dr. Böhmert discusses the maritime boundaries claimed by the U.S.S.R., Professor Bourquin casts a retrospective eye over the work of President Wilson, Dr. Castrén treats of the restoration of the naval base of Porkkala to Finland, Mr. Benjamin V. Cohen contributes an address on disarmament made before the American Branch of the International Law Association in 1952. Professor Constantopoulos takes sovereignty as the theme of a jurisprudential discussion. Judge Edmonds deals with problems of municipal and international law arising in connexion with the administration of estates. Professor Eustathiades also returns to a subject he has made his own—the European Commission of Human Rights. Professor Fragistas deals with the question of jurisdiction as approached by The Hague Conferences on Private International Law. Dr. Frangulis is concerned with the evolution of diplomacy, Dr. Garcia-Arias with humanitarian intervention and Professor Gidel with the impact of nuclear explosions upon the freedom of the seas. Judge Guerrero discourses on unilateral determination of jurisdiction and Professor Guggenheim on the *jus naturale* and the *jus gentium* as historical bases of contemporary international legal theory, while Dr. Hambro 're-visits' the Ihlen Declaration. Baron von der Heydte examines the concepts of subject and person in international law, Professor Kelsen the reason for the validity of law and Dr. Krüger the principle of effectiveness. Professor Kyriacopoulos writes on the incorporation of the European Convention on Human Rights into Greek constitutional law, Dr. Landheer on a 'structural approach' to international relations, Dr. Laun on the basis of the positive law, Professor Münch on aspects of the United Nations, Dr. Pilotti on the right of recourse of individuals to international tribunals, Professor Rammos on recognition of foreign judgments in Greece and Dr. Rühland on nuclear tests. The veteran Professor Scelle offers some reflections on the self-determination of peoples, Dr. Schätzel on humanity and inter-

national law, Dr. Schwarzenberger on the interdisciplinary treatment of international law and Professor Stone on sociological inquiries concerning that discipline. Professor Vallindas discusses general principles of law and the hierarchy of sources, Dr. Wehberg the Stimson doctrine, Judge Winiarski the so-called *forum prorogatum*, Professor Yokota war considered as a crime and, finally, Professor Zepos the theory of nullity of legal acts.

Professor Spiropoulos must feel himself most honoured by this collection, the editors of which, Professors Constantopoulos, Eustathiades and Fragistas, deserve warm congratulations upon the production of a highly interesting miscellany.

CLIVE PARRY

United Nations Legislative Series: Laws and Regulations on the Régime of the Territorial Sea. United Nations. 1957. v+811 pp.

This volume is based on a collection of laws, &c., prepared for the use of the International Law Commission. Part I contains municipal legislation, Part II treaties. The first Part is divided into five chapters dealing with: status and delimitation of territorial waters; legal régime of merchantmen; legal régime of warships; fishing; application of neutrality law. Thus in Chapter 1 there is printed in respect of the United Kingdom section 1 of the Salmon and Freshwater Fisheries (Protection) (Scotland) Act, 1951, and various subordinate or local enactments of colonial application; in Chapter 2 certain sections of the Merchant Shipping, Foreign Enlistment, Coast Protection, River Boards Rivers (Prevention of Pollution) (Scotland), Pilotage, Customs and Excise Acts, Territorial Waters Jurisdiction and Salmon and Freshwater Fisheries Acts, and of the Queen's Regulations and Admiralty Instructions; in Chapter 3 nothing; in Chapter 4 excerpts from numerous enactments dating back to the White Herring Fisheries Act, 1771; and in Chapter 5 portions of the Foreign Jurisdiction and British Protectorates Neutrality Orders, 1904. The fact that many of these pieces of legislation, emanating from a single country, have a somewhat *recherché* quality, illustrates the great value of this collection. The present writer confesses that he had never before come across the neutrality orders of 1904. But, if he was surprised to encounter them now, he was no less surprised to find no mention of the Twenty-four Hours Rule, which was specifically applied in the United Kingdom as early as 1861 (see Hall's *International Law*, 8th ed., p. 752) and thus long before the adoption of The Hague Convention XIII (which is reproduced in this volume at p. 697). How, one wonders, is this rule translated into English law? There is nothing in this volume to tell us.

The volume is based on information supplied to the Secretariat by Members of the United Nations and it is therefore largely confined in its scope to the laws and treaties of such members. This is not, of course, the fault of the compilers—though it may be noted that they have, by way of an exception, included information relating to German law supplied by the Permanent Observer of the Federal Republic. But, as a result, one cannot learn here the interesting fact that the territorial waters of the United Kingdom adjacent to Northern Ireland are, in terms of the law of the Republic of Ireland, territorial waters of that country also: see the Constitution, Article 3. Nor is it the fault of the compilers that the law of all countries is not wholly statutory, so that one may sometimes get an imperfect view of things by looking only to legislative texts. For instance, we may learn here, by reason of the reproduction of a provision of the local Interpretation Ordinance (p. 50), that the term 'Nigeria' generally includes, in the law of that Colony, the territorial waters thereof. We should need to look elsewhere to discover that

this does not involve that citizenship of the United Kingdom and Colonies by birth is acquired by a person born in a foreign ship in Nigerian waters. We must equally look elsewhere to discern that citizenship of the United States is attracted by birth in the territorial waters of that country: see Hackworth's *Digest of International Law*, vol. iii, p. 10. But occasionally the volume does contain notes of a narrative character as to the whole law of a country: see, for example, as to Belgium, p. 319 and Israel, p. 340, and the *avis* of the French Conseil d'Etat in the case of *The Newton* reproduced at p. 338.

Now the application of nationality laws within territorial waters is as much an aspect of the 'régime' of such waters as the procedure governing the appointment of a receiver of wreck. Logically, therefore, the Nigerian Ordinance alluded to should have been supplemented by the text of section 32 (5) of the British Nationality Act, 1948. But it is understandable that the compilers of this volume should have drawn the line somewhere. What is not clear, however, is why, when Chapter 2 of the first Part is subdivided into sections the second of which is entitled 'Criminal and Civil Jurisdiction', the matter of civil jurisdiction should be dealt with so sketchily. One does find, indeed, in the note concerning Belgian law referred to already, a general statement of the principles upon which Belgian civil jurisdiction over territorial waters is exercised. But where is the corresponding account of the Admiralty jurisdiction of the High Court in England? There is no mention whatsoever of the Administration of Justice Act, 1956, which incidentally introduces the rule, new to English law, that an action *in rem* may be maintained against a vessel in respect of a cause of action arising out of the operation, not of that vessel but of any other in the same ownership. The omission is particularly surprising in view of the inclusion (at p. 721) of the Brussels Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision, upon which the innovation is based. Admittedly the Act was passed late in the year and information received after November 1956 is in this volume relegated to an appendix. Still, the earlier legislation which the Act replaces does not appear either. It may be noted, moreover, that the comparable Canadian enactment, the Admiralty Act, 1934, is reproduced (p. 322). One is inclined to suspect that the questionnaire sent out by the Secretariat was not quite clear as to the extent of information desired. This impression is reinforced upon a consideration of the chapter headings. For how may one distinguish between inquiries as to the 'juridical status' of territorial waters and as to the 'legal régime' applying thereto?

One realizes the very great difficulties compilers of such a collection as this face. But it is thought proper, nevertheless, to make a plea for more careful consideration of internal references in texts reproduced. For instance, the text of the Ceylon Admiralty Ordinance, as supplied by the Ministry of External Affairs, refers to the Colonial Courts of Admiralty Act of the United Kingdom (p. 329) (and incidentally also to the Admiralty jurisdiction of the High Court in England). The same reference is made in the Note of the Israeli Ministry of Foreign Affairs which is reproduced (see p. 341). Yet one looks in vain for the enactment referred to, or for a mere statement that it is immaterial.

CLIVE PARRY

Self-Defence in International Law. By DR. D. W. BOWETT. Manchester University Press. 1958. xv+294 pp. 37s. 6d.

In undertaking this new study of a doctrine notoriously subject to so many difficulties of interpretation and application Dr. Bowett admits, in his preface, that 'State practice cannot be relied upon to give a consistent, logical explanation of the development of the

right of self-defence'. Nevertheless, he prefers an empirical method of approach, believing that the right, or, more correctly, the 'privilege', of self-defence, is capable of legal analysis in spite of the anomalies and inconsistencies that have in the past marred its exercise by States. His principal object, although this does not become fully apparent until the second half of the book (p. 115 et seq.), is to redefine the scope and the limitations of permissible self-defence within the context of the U.N. Charter; his thesis is that the use or the threat of force by any State must in present circumstances amount to either a delict, an approved sanction, or measures taken in self-defence. The work therefore examines both the growth and shaping of the doctrine in the nineteenth and early twentieth centuries, with the assumption of the existence of a State's unlimited 'right' to go to war, and then attempts to outline the new limited and provisional effects of the right under the operation of the Charter.

In a short introductory chapter (pp. 3-25) Dr. Bowett states his belief that although self-defence is one of the many forms of self-help recognized in international law it is clearly distinguishable from other forms by virtue of its nature as a privilege which legalizes otherwise illegal action taken to protect certain essential rights of any sovereign State. The pre-condition of delictual conduct on the part of the State against which action is taken therefore distinguishes self-defence from 'self-preservation' or 'necessity', and the preventive and non-retributive character of the right will, in the author's view, suffice to distinguish it from other forms of self-help. These doctrines are, of course, ill-defined and often overlap; Dr. Bowett's insistence that the essence of self-defence lies in its reaction to a delict, even if it cannot resolve a number of present difficulties, does at least lead to a clear and cogent text and provides a broader working definition of the right than that offered by Kelsen (see *American Journal of International Law*, 42 (1948), p. 784). It is perhaps to be regretted that this introductory chapter does not contain a more adequate sketch of the historical development of the doctrine; the learned author might, for example, have found much of interest on the relationship between self-defence and necessity in the works of Machiavelli.

The first part of the work proper (pp. 29-114) is devoted to an exposition of the substantive rights for which self-defence is a permissible means of protection. These are the rights of 'territorial integrity', 'political independence', 'defence of the state's security on the high seas', 'protection of nationals', and, lastly, 'defence of economic interests'. In the discussion of the limits of these rights a number of controversial points are raised. For example, the doctrine of 'hot pursuit', rightly regarded as exceptional and uncharacteristic of self-defence, is considered both in relation to territorial integrity and the régime of the high seas (pp. 38-41, 82-86), and U.S. practice in attempting to equate the two forms is criticized. The right of political independence, viewed in the light of Article 2 (4) of the Charter, is far from well-defined, and Dr. Bowett does not gloss over the difficulties presented by modern methods of propaganda in relation to the duty of non-intervention, or by the failure to prevent or control private hostile, but not belligerent, activities directed against a friendly power. For if there is no delictual breach of duty, then, according to his thesis, there can be no right of self-defence to preserve the status quo. Similar problems have to be faced in his discussion of the limits of protective (or preventive) jurisdiction over the high seas (p. 66 et seq.); here he is surely right in excluding claims to jurisdiction over Customs and Revenue enforcement, as well as those over the conservation of fisheries, from the concept of self-defence, although his claim that 'self-defence' remains appropriate only to action of a character not sanctioned by customary right is open to question. The right of a State to protect its nationals abroad (i.e. their lives, and, exceptionally, their property) even to the extent of intervention by force is carefully examined; here, and in a number

of other contexts, it is unfortunate that the interventions in Hungary and Egypt of October 1956 cannot receive more than a brief mention (pp. 15-16, 32, 104, 242). As far as the final substantive right, that of the defence of economic interests, is concerned, Dr. Bowett, although including it within the scheme of his work, can find 'little relevance' between it and the right of self-defence (p. 113). The phrase 'economic aggression' is at present not without meaning, but it will scarcely ever *by itself* provoke the use or threat of force.

At this stage the reader is already greatly indebted to Dr. Bowett for illustrating in his text just how far State responsibilities have enlarged and multiplied since the relatively simple pronouncement of Mr. Webster, the U.S. Secretary of State, in 1842, in the case of *The Caroline*. His demand of Great Britain to show 'a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation' was almost exactly an echo of the tests that Grotius had imposed, two centuries earlier, upon the practice of necessity (*De Jure Belli ac Pacis*, Bk. II, cap. 1, ss. iv, v, xii); what scope and meaning can the doctrine have, however, a century after *The Caroline*, with international society striving for a degree of centralization hitherto unknown?

In the second part of this book (pp. 117-268) there is an attempt to answer this question by presenting the antithesis inherent in the problem. Dr. Bowett investigates the relationship between self-defence and the 'right' of war, wisely avoiding reliance upon any arbitrary distinction between 'pacific' and 'belligerent' measures, and traces in outline the growth of the movement toward a general prohibition of war before embarking upon a detailed examination of self-defence under the Charter. He presents, without undue compression, a comprehensive and critical survey of the movement, with a particularly interesting discussion (p. 138 et seq.) of the interpretations laid upon the right of self-defence by the Kellogg-Briand Pact of 1928 and by the Military Tribunals at Nuremberg and Tokyo. It is at this point that the central issue raised by the doctrine at the present time comes to the fore. How far is it true to say that all force must now, under the terms of the Charter, be characterized as delict, sanction, or self-defence? And, even if true, does this characterization really succeed in avoiding the pitfalls so often encountered in the movement toward a prohibition of war?

In spite of difficulties caused by a lack of authority as to the operation of material sections of the Charter, and by attendant problems raised by ambiguities and points of interpretation, Dr. Bowett is able to argue most persuasively, and with a wealth of documentation, in favour of the view that this tripartite characterization of force has substantially been achieved. To the present reviewer, however, a number of points need further elucidation; for example, the author's view (p. 154) that the obligation not to resort to force or threats of force is limited by the words 'against the territorial integrity or political independence of *any state*' does not seem, as he claims, to give the 'plain meaning' of Article 2 (4). Nor does his thorough study of the infringement of neutral rights as a result of measures taken in self-defence resolve the confusion existing in this field (p. 167 et seq.) between pleas of self-defence, self-preservation, reprisal, and necessity. As far as the vexed question of the relationship between Article 2 (4) and Article 51 of the Charter is concerned, however, Dr. Bowett is not alone (p. 185) in criticizing the restrictive view taken by Kelsen (*Recent Trends in the Law of the United Nations*, p. 914), which seems to assume that members possess only those legal rights granted to them under the Charter. One must also support his contention that self-defence will become, under an effectively centralized system of international security, even more provisional in character than it has been regarded in the past; as a concept it is in no way interrelated or correlative with that of aggression (p. 249 et

seq.). His chapter on 'Collective Self-defence' (pp. 200-48), the gist of which has already appeared as an article in this *Year Book*, 32 (1955-6), p. 130, will provoke sharply divided opinions, since it explores both the relationship between 'collective self-defence' under the Charter and that envisaged by the principal 'regional arrangements', and other treaty arrangements which contemplate the use of force without the prior sanction of the U.N. To the present reviewer the term 'collective self-defence' seems neither accurate nor helpful; Dr. Bowett admits many criticisms of its use, yet he considers it permissible as descriptive of 'the collective exercise of an individual right' (p. 207). The term may, however, be easily distorted in certain political circumstances and does not assist in preserving the essential distinction between collective security and self-help. Nevertheless, this is a stimulating chapter and contains a valuable summary of State practice prior to the Charter, in addition to much pertinent criticism of the various treaties involved.

Throughout the work there is a refusal to dogmatize or to state in absolute terms any aspect of the 'privilege' of self-defence in its present context. Dr. Bowett uses the empirical method most effectively, relying on a very wide range of authorities, and his text is always clear in argument and presentation, although sometimes (perhaps inevitably) repetitive. There are occasional misprints (see, for example, pp. 5, 36, 119, 124, 166), but the book is well produced, with comprehensive tables of cases and treaties and a good bibliography. It is certain of a warm welcome, and its author is to be congratulated on producing a timely and scholarly survey of one of the most fundamental, and often abused, sovereign rights known to international law. K. R. SIMMONDS

The Basis of Obligation in International Law and Other Papers. By the late JAMES LESLIE BRIERLY. Selected and edited by SIR HERSCH LAUTERPACHT and C. H. M. WALDOCK. Oxford: Clarendon Press. 1958. 375 pp.

By collecting the writings of that profound jurist and lawyer-philosopher, James L. Brierly, the editors of this volume, Sir Hersch Lauterpacht, Judge of the International Court of Justice, and C. H. M. Waldock, Chichele Professor of Public International Law at Oxford, have done a great service to the study of international law. Now in its fifth edition, Brierly's introduction to international law—*The Law of Nations*—has become a standard work, and it was important to bring together not only his lectures given in 1928 at The Hague Academy of International Law, but also his scattered writings which were not always easily accessible.

Professor Waldock's biographical notice and Judge Lauterpacht's very remarkable introductory essay on Brierly's contribution to the study of international law portray a man of the highest integrity and a thinker whose penetrating vision has deeply influenced the ideas of the present generation.

It was on the philosophy of international law and the basis of relations between States that the impact of Brierly's thought was of prime importance. Drawing upon philosophy and sociology, he discarded the superfluous and retained just what was necessary for a better understanding of these fundamental problems. He had to an exceptional degree the gift for clear exposition of these difficult problems in simple and direct language, with a certainty born of long reflection and with a sense of proportion inspired by his constant determination never to attribute to international law objectives beyond its purpose and abilities. A rare insight, reinforced by keen observation, had from the very beginning saved him from those misconceptions which theorizing and generalization impose upon social realities.

Among Brierly's writings, the editors have rightly assigned a prominent place to lectures on the *Fondement du caractère obligatoire du droit international*, which were given in 1928 at The Hague Academy of International Law and are now for the first time published in English. Already in them are to be found those basic tenets which, in spite of occasional backward glances or hesitations, always candidly admitted and therefore eminently instructive, are consistently affirmed in all his writings. His critical analysis of the concept of sovereignty (Chapter VI) is a model of scientific discussion. The jurist's criticism of the exaggerations of sovereign powers does not prevent the historian from recognizing the extent to which, at that particular stage of their development, they were understandable and even inevitable. It is there also that his ideological convictions, such as the moral basis of obligation and the modern resurrection of a reformed natural law—that ultimate barrier against the dangerous supremacy of power—first appear; and they are stated with a firmness from which he was never to depart.

None who takes this road is spared the apparent contradictions in the practice of the States. Brierly faced them repeatedly with courage and dignity. In this connexion, as well as his Hague lectures on the *Règles générales du droit de la paix* (*Recueil*, 1936—IV) and *The Outlook for International Law* (1945), a work published after the Second World War, several studies reprinted in the present collection will always be read with the greatest profit. Prominent among these are 'The Rule of Law in International Society' (p. 250); 'The Covenant and the Charter' (p. 314); and 'International Law: Some Conditions of its Progress' (p. 327). The last of these essays contains the final formulation of his thought on the relationship between power, order and law.

A particularly clear understanding of international politics, his inborn distrust of facile solutions, in short his preference for reality, put him on guard against placing too much reliance on treaty solutions, which in our times are so easily adopted and so quickly forgotten. Furthermore, he was persistent in his defence of the values which he considered to be the basis and ultimate end of all law. Beyond the casual manifestations of the wills of States, he saw in the human aims of State power the principle and measure of international obligations. No doubt this to a certain degree reflects his innate goodness and his essential humanity, which are underlined by his biographer, Professor Waldo.

The spectacle of injustice often moved him and sometimes made him indignant; but it never surprised him. He was an idealist in the true sense, and his was that brand of idealism which withstands the pressure of the sternest realities. Refusing to harbour illusions, he never abandoned hope.

These pages collected in homage to an inspiring master will long bear testimony to the diversity of his gifts and to his outstanding intellectual honesty.

CH. DE VISSCHER

Dicey's Conflict of Laws. 7th edition. General editor: J. H. C. MORRIS, D.C.L. London: Stevens & Sons Ltd. 1958. cxxiv + 1116 + (index) 64 pp. £7. 7s. od.

It is a curious paradox that whereas in countries governed under a codified system of law, treatises on conflict of laws are for the most part in normal textbook form, in England this leading authority should present the subject in a series of code-like rules (now numbering 205) with separate commentaries under each rule. This design which has been preserved since Dicey's first edition in 1896 partly explains the usefulness of the work to practitioners everywhere and to foreign readers in particular, but the greater credit still goes to the vigorous editorship of Dr. Morris and his specialist collaborators.

Although only nine years have elapsed since the 6th edition, Dr. Morris states that he found the task of preparing a new edition much more laborious than he expected; the result is correspondingly a greatly improved textbook.

The major innovation which has been made consists in rearrangement. Dicey's tripartite division into Jurisdiction of the High Court, Jurisdiction of Foreign Courts and Choice of Law has been abandoned, and topics are now dealt with in separate chapters corresponding to the divisions of the subject now commonly made by writers. This both avoids the fragmentation of subjects which made the previous editions sometimes difficult to work with and facilitates comparisons with other books, references to which are, as before, conveniently given at the beginning of each chapter or section. The new arrangement further recognizes the importance, greater now than in Dicey's day, attaching to private international law in relation to matrimonial causes, the winding-up of companies and the administration of estates.

In addition to this reorganization, fourteen chapters have been rewritten in whole or in part. Although the treatment of *renvoi* in the 6th edition was one of the best in the English language, it has been subjected to considerable and worthwhile revision. A new account is given of its origin and development in English law, tracing it back to *Collier v. Rivaz* (1841). The cases are subjected to even more stringent criticism from which neither *Re Annesley* (1926, Ch. 692) nor *Re Wellington* (1947, Ch. 506) escape and the conclusion is drawn that the history of *renvoi* in English law is the history of a chapter of accidents. As to the usefulness of the doctrine the suggestion is put forward that, while in general the theoretical and practical difficulties involved in applying the doctrine outweigh its advantages, 'a relatively strong case' exists for its application to questions involving title to land or to movables situated abroad, the formal validity of wills, the formal validity of marriage and certain cases of transmission. In criticizing the doctrine the commentary places great—perhaps excessive—weight on the unpredictability of the result, a comment which may be true of the comparatively small number of cases which reach the courts, but is not necessarily the case in relation to the greater number handled by practitioners.

Another passage which has been largely revised and in the judgment of the present reviewer clarified, is that on characterization, one of those recently discovered topics which give to the subject of 'conflicts' a special intellectual distinction. Advantage has been taken of Wengler's article in *Revue de droit international privé* (1954) to discuss what it is that is characterized; and as to the method to be followed the editors now come down more heavily against the theory advanced by Beckett that characterization should be performed in accordance with principles of analytical jurisprudence. The practical reader will be grateful for the shortening of the passage on the theory of primary and secondary characterization, its advocate, Dr. Cheshire, having now abandoned it. There is a long and interesting new passage (p. 50 et seq.) testing the five current theories against concrete situations and incidentally bringing out the inadequacy of judicial analysis of the subject. On the related topic of the 'incidental question', in place of the former hesitant view that this should be decided by the conflicts law of the forum, the editors now reach the sceptical conclusion, following Gotlieb, that there is no problem of the incidental question but as many problems as there are cases in which incidental questions may arise.

We cannot in the space available discuss in detail the numerous other passages which have been recast: many of the changes may be controversial but all are stimulating. We must be content to draw attention to the far more adequate treatment now given to the subject of interpretation of wills (p. 614 et seq.), and to the situs of things (p. 502 et seq.). There is a succinct and interesting examination (p. 657 et seq.) of the question

of mutability in relation to the effect of marriage on the title to movables. The departure from unquestioning acceptance of the House of Lords decision of *Lashley v. Hog* (1804) is to be welcomed but the arguments adduced—in the absence of better authority—in favour of mutability (with an exception in favour of vested rights) will probably not pass without challenge. One revision which is possibly less securely based than the others is that dealing with the discharge of contracts (p. 804 et seq.). After stating the—surely correct—principle that this is a matter for the proper law, the editors have been led to depart from this principle, rather more widely than it is conceived that the decisions require, in cases of a change of debtor. It is respectfully suggested that the decision in *National Bank of Greece and Athens v. Metliss* ((1957), 3 W.L.R. 1056) is of very limited application and does not justify a general statement (p. 810) that the substitution of one debtor for another by legislation can be effected otherwise than by the proper law.

R. O. WILBERFORCE

Les Aspects Juridiques de l'Assistance Technique dans le Cadre des Nations Unies et des Institutions Spécialisées. By GUY FEUER. Bibliothèque de Droit International. Paris: R. Pichon et R. Durand-Anzias. 1957. 234 pp.

This is a book on a subject of recent growth. It is an interesting study of the new manifestations arising from technical assistance to underdeveloped countries within the framework of the United Nations Organization and its Specialized Agencies. As the title indicates, the author is solely concerned with the legal aspects of technical assistance and not with its economic or historical aspects. He carefully studies and classifies the complexities of international organization which arise from a machinery created empirically, almost haphazardly, with the primary object of meeting the needs of technical assistance as they arose and with little concern for the legal framework of such assistance. Necessarily, the legal contours of such a development are bound to be vague. The very terminology 'technical assistance' has a functional connotation and therefore evades legal definition. Consequently, the author has difficulty in finding legal rules for the new elements introduced into the law of international organizations with the advent of technical assistance. To do this, he draws upon the accepted norms of international law and resorts to an extensive interpretation of the Charter, finding legal justification in the theory of 'implicit powers' of the United Nations Organisation as formulated by the International Court of Justice in its Advisory Opinion of 11 April 1949 in the case of *Reparation for Injuries Suffered in the Service of the United Nations*.

In his preliminary chapter, Mr. Feuer discusses the two legal sources of technical assistance, that is: (1) the resolutions of the various organs of the United Nations, and (2) the technical assistance agreements between States and the organizations concerned. He sees in the first source a turning-point in the history of international organizations and stresses the innovation in the creation of an organization by resolutions of the United Nations rather than by the hitherto known method of international conventions. This leads to an interesting discussion regarding the validity of United Nations resolutions, and, after an examination of the various authorities, he arrives at the conclusion that such resolutions are binding when concerned with the internal life of the organization. As regards the second source, he sees in the agreements concluded between the States and the international organizations a confirmation of the treaty-making power of the latter, within the limits of their functions. He even sees a development of this power (what he terms 'fédéralisme administratif') in the fact that these agreements are made

between one State as one party and a number of international organizations acting jointly under the cloak of the Technical Assistance Board—an inter-organizational body—as the second party.

Mr. Feuer then proceeds to divide his book into two parts. In the first part, he discusses technical assistance as an institution, and devotes the second part to the study of technical assistance as a function. The first part deals with a detailed analysis of the organs of technical assistance. He dwells upon the originality of the Technical Assistance Board as an inter-organizational organ, that is a body of representatives of the various agencies related to technical assistance, possessing a 'personnalité administrative' to enable it to act in the name of the various agencies, but devoid of an international personality. He then passes on to a study of the recruiting of the personnel and the experts, the procedure of application for assistance, the initiation of programmes and the financing of such programmes.

In the second part of his book, Mr. Feuer embarks upon a detailed study of the status of the expert in international law *vis-à-vis* the organization employing him, the recipient State and the State of which he is a national. In this connexion, he examines the attributes of International Civil Servants and distinguishes between these and 'experts'. This is followed by a study of the immunities and privileges of such experts based on the United Nations Convention on Privileges and Immunities of 13 February 1946 and the Convention on Privileges and Immunities of the Specialized Agencies of 21 November 1947. In studying the administrative side of technical assistance, Mr. Feuer draws on French Administrative Law where the law of the United Nations or the general norms of international law do not provide for some of the relationships in the complex machinery of technical assistance. This machinery, if following any pattern at all, seems to follow that of American Public Administration more than any other system of administrative law. However, the author is careful enough not to adopt principles of French Administrative Law as such but only to use them for purposes of comparison and reasoning by analogy. As Mme Bastid states in her preface to this book, French Administrative Law would be too rigid to be applied to international administration in view of the differences in the traditions and in the ways of growth of the two systems. The author devotes a chapter to professional training, such as the legal aspects of fellowships for the training of technicians, the organizing of seminars and training centres, &c. His last chapter is concerned with the legal status of equipment and supplies sent to the recipient States under the technical assistance schemes.

Mr. Feuer has extracted the legal element from a mass of United Nations material predominantly political and economic in nature. His general conclusion is that the time has come to set up a charter of technical assistance, defining clearly the powers of the organs, the status of experts, &c. This book is an important contribution towards the preparation of such a charter.

S. TORIGUIAN

L'Énergie Atomique et les États-Unis: Droit Interne et Droit International.
By GEORGES FISCHER. Paris: Pichon et Durand-Auzias. 1957. 408 pp.

This book, presented under the auspices of the *Institut des Hautes Études Internationales de l'Université de Paris*, constitutes the first volume of a series on international law.

The greater part of the work naturally concerns the Atomic Energy Commission (A.E.C.), with a discussion of the factors necessitating its creation in 1946 and a consideration of its position against the general background of the role of the indepen-

dent commissions in the American administrative system. The history of the formation of the Commission is followed by a more detailed account of its structure, its relations with the executive and the control exercised over the Commission by Congress through the Joint Committee on Atomic Energy. The author's treatment of the problems arising from contracts made between the A.E.C. and private firms shows the difficulty of trying to reconcile a maximum of freedom of action for the contracting firms with the necessary right of the Commission to inspect, control and supervise the activities carried out by such firms in connexion with these contracts. The position of employees of the A.E.C. is dealt with perhaps not quite so fully as one might have wished: the chapter might have gained from some comparison with other fields where employees are subject to similar restrictions. The Commission's control of atomic information, the problems of patents in this sphere, and the regulation of activities carried on by private industry in connexion with atomic energy are all discussed at some length; and there is also an interesting account of the reorientation of American thinking on the subject of atomic agreements with other countries, describing how Russia's emergence as an atomic power put an end to the American monopoly, of which the McMahon Act of 1946 was the expression, and led to the more liberal legislation of 1954.

Of more interest to the international lawyer are the last three chapters of this book, two of which concern the International Agency. The incorporation of the statute of the Agency is a welcome addition to the detailed investigation of its creation, structure and composition, and its relations with the United Nations and the Specialized Agencies. M. Fischer ends this volume with a discussion of the legality of nuclear tests, concluding that the American tests violate the freedom of the high seas and are contrary to general principles of international law. Unfortunately he does not allow himself sufficient space for an adequate treatment of the question, and brevity seems to have led here and there to dogmatism. Not all international lawyers would agree with him, for instance, that unilateral practice, even in the absence of all protest, can never form the basis of a rule of international law if the practice is clearly contrary to international law (p. 383).

In this book M. Fischer has given us a careful study of a topic of importance for international and constitutional lawyers. It is extremely well documented, if anything erring on the side of excessive annotation, though it is regrettable that when citing observations from judgments in international courts the author should, in referring to the report, omit all mention of the name of the case. The index, while accurate, is less useful than it might have been on account of its shortness. The wealth of detail on the debates and discussions prior to the creation of A.E.C. is extremely valuable, though slightly marred in presentation by a critical approach, which, in itself instructive, results in a dialectical form of treatment of the subject that is as unnecessary as it is confusing.

These, however, are minor shortcomings which do nothing to prevent this from being a worthy beginning of a series whose further volumes we await with high hopes.

P. J. FITZGERALD

The International Protection of Trade Union Freedom. By C. WILFRED JENKS. London: Stevens & Sons Ltd. 1957. xl+592 pp. £4. 4s. od.

The author states in the introduction to this work that its object is 'to describe the development in recent years of international action for the protection of freedom of association for trade union purposes, and to state as concisely and descriptively as possible the current law and practice governing the international arrangements for

such protection'. Even allowing the author's claim that the question is one of increasing practical importance, on which a substantial body of law and practice has developed, it may at first sight come as some surprise that he considers it worthy of a work of these proportions. It would appear that, apart from instruments in very general terms such as the Charter of the United Nations, the non-binding Universal Declaration of Human Rights, the unfinished Draft Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and one or two regional instruments, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, international guarantees and standards in the matter of freedom of association for trade union purposes are based primarily on four I.L.O. Conventions. These are the Right of Association (Agriculture) Convention, 1921, ratified by 41 countries; the Freedom of Association and Protection of the Right to Organize Convention, 1948, ratified by 23 countries; the Right to Organize and Collective Bargaining Convention, 1949, ratified by 26 countries; and the Right of Association (Non-Metropolitan Territories) Convention, 1947, ratified by only 4 countries, but applicable to the whole of Africa south of the Sahara with the exception of the Portuguese territories and the Union of South Africa, as well as to British, French and New Zealand territories in other parts of the world. (In each case the figures show the number of countries that had ratified by 1 January 1957.)

The first of the conventions just mentioned merely prohibits discrimination in the matter of the right of association against agricultural workers as compared with industrial workers; whilst the fourth is merely an interim arrangement pending the introduction of the second and third conventions in the territories concerned. It is the latter two conventions which declare substantively the right of employers and workers to establish and join organizations of their own choosing without previous authorization and in particular the right of workers to enjoy adequate protection against acts of anti-union discrimination in respect of their employment. There are also a number of I.L.O. Recommendations dealing with the same subject, not to mention less formal instruments such as resolutions adopted by the International Labour Conference, Regional Conferences and Industrial Committees. The application and enforcement of these standards seem to depend less on any measures peculiar to these standards than on the functioning of the I.L.O. as a whole, and in particular on its tripartite character as an organization composed of representatives of employers and workers as well as governments. But, with the entry into the I.L.O. of many countries with completely socialized economies, this tripartite character has been subjected to increasing strain. Rightly or wrongly, the Organization seems to have rated universality of membership as of greater importance than the maintenance of the original conception. At any rate, the credentials procedure, which might have been the most effective method of preserving the genuinely tripartite character of the Organization, has been applied by successive International Labour Conferences in a rather timid manner. Dr. Jenks, however, throws much valuable light on the operation not only of the credentials procedure but also of other procedures capable of playing a part in implementing the standards set for itself by the I.L.O. These include the procedure of special inquiries, such as the report of the Committee on the Freedom of Employers' and Workers' Organizations (McNair Committee), 1955-6, whose exhaustive report is analysed in this book, and also various procedures agreed with the Economic and Social Council for investigating allegations of infringement of trade union rights.

It is the insight given into the operation of the I.L.O., and the author's careful evaluation of the successes and limitations of that Organization in its present form, that constitute the most valuable part of this work. For, as Dr. Jenks rightly says, the

experience gained as a result of the attempt to implement international standards in the matter of trade union freedom represents a significant contribution to the development of fact-finding and conciliation procedures as a whole. There will certainly be little point in proceeding to draw up any more universal declarations on matters of social policy unless further study is given to problems of enforcement. Seen in that context, the somewhat primitive attempts so far made by international society to secure the right of freedom of association as a basic human right may come to assume greater significance. Correspondingly, it may be expected that, in the course of time, Dr. Jenks's foresight in selecting this particular subject for so penetrating and comprehensive a study will come to be all the more appreciated.

D. H. N. JOHNSON

Gleichberechtigung von Individuen als Problem des Völkerrechts. By DIETRICH SCHINDLER. Zürich: Polygraphischer Verlag A.G. 1957. vi+159 pp. No price stated.

This work deals with the equality of individuals as a problem of public international law. The three different aspects of the problem are clearly distinguished. The first part treats equality of aliens and nationals, the second equality of aliens *inter se*, the third equality of nationals *inter se* and of human beings in general.

In the first part the author rejects as a test the theory of the minimum standard recognized by international law, mainly on the ground (p. 54) 'that in the present family of nations a privileged position of aliens is in principle impossible' or that 'it would be tantamount to the assertion of absolute claims and to the pursuance of unrealistic ideals'. He also rejects the principle of unqualified equality, which 'would involve the negation of the community of nations and peaceful international relations'. The author favours the principle of non-discrimination which, as he rightly points out (p. 56), may involve an improvement of the alien's position over the minimum standard, but he does not seem conscious of the fact that in practice mere non-discrimination is frequently insufficient and that a minimum standard is the indispensable basis of protection.

In the second part Dr. Dietrich Schindler develops the idea that it is an abuse of rights and accordingly unlawful to cause detriment to specific States, but that it is permissible to prefer certain States (p. 83). But when the principle is applied to practical cases, such as immigration laws involving discrimination, the author, not unnaturally, returns to the test of arbitrariness (p. 94).

The third part is, in effect, an essay on human rights. It includes in particular a discussion of the nature and the extent of the obligations relating to the protection of human rights, which the Charter of the United Nations has imposed. After a summary of the actual disputes which have arisen and among which the South African-Indian dispute takes pride of place (unfortunately the decision of the House of Lords in *Regazzoni v. K. C. Sethia Ltd.*, [1957] 3 All E.R. 286, came too late for consideration by the author), he argues persuasively (p. 140) that Article 56 of the Charter creates a duty of omission and that, therefore, Article 56 is violated where a State takes measures which are obviously inconsistent with its purpose. The book concludes with a useful discussion of some general problems arising in connexion with duties of equal treatment.

This is a scholarly work which justifies the expectation that the author, in deciding to follow his distinguished father's footsteps, will establish for himself an independent title to recognition. Though the author sometimes shows a liking for arguments of a

verbal character, his manner of reasoning discloses the academic tradition in which he was brought up, and the care bestowed upon the collection of material proves his devotion to detached research.

F. A. MANN

International Law. By GEORG SCHWARZENBERGER, Ph.D., Dr.Jur. In 4 volumes, Vol. I (third edition): *International Law as applied by International Courts and Tribunals: I*. London: Stevens & Sons Ltd. 1957. xlviii + 808 pp. 63s.

It is nine years since the publication of the second edition of Dr. Schwarzenberger's now familiar work. In that time the International Court of Justice has given fourteen Judgments and ten Advisory Opinions. These, together with some decisions of Conciliation Commissions and of *ad hoc* arbitrations, such as those in the *Diverted Cargoes* case and the *Ambatielos* case, have now been incorporated into the latest edition of *International Law as applied by International Courts and Tribunals*. The inclusion of this new material partly explains the increase in the size of the present volume over its predecessors. In addition, as Dr. Schwarzenberger explains in his Preface, he has sought to change the emphasis of the volume 'from systematic exposition to critical evaluation of the judicial material'. Finally, the whole work has been reset in a larger and more readable type.

The result of these changes is that while the second edition contained approximately 680 pages divided into seven substantive parts, the present edition contains 800 pages which cover only the first five of these parts, namely, the foundations of international law, international responsibility, state jurisdiction, objects of international law and international transactions. War and neutrality and the law of international institutions will form the subject-matter of the second volume. These changes are accompanied by some modification of Dr. Schwarzenberger's original plan as announced at the time of the publication of the first edition of Volume I in 1945. The titles which it was then anticipated would be devoted to 'British State Practice' and the 'Judicial decisions of English Courts and other Courts within the British Commonwealth and Empire' are now to be merged into a second part of the work which will appear in two further volumes.

It is upon the change from 'systematic exposition to critical evaluation of the judicial material' that the attention of those interested in the volume as a contribution to the literature of international law will probably focus. Dr. Schwarzenberger identifies in the following terms the standards of criticism which he employs: 'This [the change to critical evaluation] raises the question of the standards of criticism applied. Primarily, they are those basic rules of international law which are so well attested by inductively verifiable evidence as to be practically uncontroversial. Secondly, they are relevant working hypotheses which are gained from related academic disciplines.' He refers, in particular, to 'historical and sociological working hypotheses' which 'can put us on our guard against unduly venturesome enterprises in judicial law-making which appear out of tune with the rules governing the fundamental principles of international law and, therefore, are unlikely to be generally acceptable as "developments" of international law by judicial organs' (Preface, p. xv).

In practice, however, it would appear that the author has been limited by the basic pattern of his volume from pursuing the detailed examination of the cases which is inherent in undertaking a 'critical evaluation' by reference to the hypotheses mentioned

in the Preface. For, it will be recalled, the present work is not a general treatise on international law, but simply an examination of international law as applied by international tribunals; and the self-denying ordinance which the author has thus imposed upon himself appears largely to preclude him from pursuing his criticism by reference to situations which have not been the subject of judicial decisions.

The difficulties which thus arise may be illustrated by reference to the problem of the extent of a State's right to exercise jurisdiction extra-territorially. The context in which this problem has aroused the most concern in the past decade and which has been the subject not only of numerous articles but also of a number of important decisions by United States courts is that of the application of the United States anti-trust laws to the conduct of business abroad. In all the discussions on the subject, the judgment of the Permanent Court of International Justice in *The Lotus* case has filled a central place. Nevertheless, in his section on 'The Scope of Criminal Jurisdiction' the author has limited his treatment of the case to what is no more than a quotation of general principle from the judgment of the Court.

By way of contrast with the author's treatment of *The Lotus* case, reference may be made to his observations on the *Anglo-Norwegian Fisheries* case. Here the reader may well be left with the feeling not that the author has failed to criticize the judgment, but that, having regard again to limitations of space and system, he has been unable fully to apply the standards of criticism which he sets out in the Preface. In so far as 'basic rules of international law which are so well attested by inductively verifiable evidence as to be practically uncontroversial' constitute one of the criteria, Dr. Schwarzenberger does not really establish the existence of a rule which satisfies this test and which, at the same time, can be said to be contrary to the decision of the Court. And it is significant of the operation of the author's self-denying ordinance that, assuming him to be applying 'relevant working hypotheses which are gained from related academic disciplines', he makes no mention of the relevance to this problem of economic factors. Nor does he refer to the fact that the rules laid down by the Court had, even before the present edition went to press, received general sanction and acceptance by their inclusion in the International Law Commission's Draft Articles on the Law of the Sea which subsequently were almost wholly incorporated into the Conventions adopted at Geneva in April, 1958.

These observations on the application by Dr. Schwarzenberger of his standards of evaluation, in so far as they may appear to be critical, are offered with hesitation. They should not really be regarded as in any way detracting from the merit or value of the work as a whole when viewed as a systematic exposition of the points on which international tribunals have contributed to the body of international law. At the same time, because of the limited range of material to which, by choice, the work refers, it must occasionally be used with some caution, especially in those areas of the law upon which decisions of international tribunals have had comparatively small impact. The student, for example, who relied for his knowledge of the present status of the Continental Shelf upon the passages at pp. 345-52 of the volume would have to be forgiven if he came away with the impression either that the last word on the Continental Shelf had been spoken by Lord Asquith in 1951 or that the assertion by the littoral state of a right to exclusive enjoyment of the resources of the Continental Shelf was contrary to international law.

Nevertheless, despite those observations upon the results of the method employed in the volume, sight should never be lost of the substantial achievement or of the contribution to the corpus of international law which this volume represents. It does much more than carry forward the work begun by Ralston in his *Law and Practice of Inter-*

national Tribunals. It is a work which deserves to be on the shelf of every scholar as a guide to the nature and content of the international judicial materials bearing on any particular problem, for it reflects great knowledge unhesitatingly placed at the disposal of the reader. Dr. Schwarzenberger announces in the Preface his intention in due course to publish a companion volume, *International Law in Perspective*. There will be many who, like the present reviewer, hope that Dr. Schwarzenberger will there give them the benefit of a treatise in the traditional sense, deploying all his reserves of wisdom and skill and consolidating in a single text his interpretation of the effects of the various sources of international law.

E. LAUTERPACHT

Termination of Membership of International Organisations. By NAGENDRA SINGH. London: Stevens & Sons Ltd. 1958. xv+209 pp. Price 30s.

The author's main purpose in this treatise is to examine the validity of the exclusion from the United Nations and its Specialized Agencies of the representatives of the Central People's Government of China. In the author's view this exclusion amounts to a termination of the membership of China. This leads him to an examination of the whole question of the means by which membership of international organizations can be lawfully terminated. Frequently the constituent instrument setting up an international organization expressly provides for withdrawal, expulsion and suspension of membership. The author exhaustively analyses the various forms of clause making such provision in instruments establishing international organizations. Where no such provision exists the author takes the view that the right of the member to withdraw from the organization exists, but the organization itself has no corresponding right to expel or suspend the Member State except possibly where that State has refused to ratify a lawful amendment to the organization's constitution.

The general principles of international law thus formulated, the author seeks to show—successfully, it is believed—that the exclusion of Communist China from the United Nations is contrary to international law. States, not governments, are members of international organizations, the government being only the mouthpiece of the State. A change of government has no effect on the binding force of treaties except where the doctrine of *rebus sic stantibus* can be invoked. This latter argument has no application to the present problem since the United Nations includes many types of government, including Communist and non-Communist new and revolutionary governments. Whatever may be the rule of international law concerning inter-governmental recognition, an international organization, the author argues, is under a duty to admit the effective government of a territory whatever its origin or political creed unless as stated there is provision in the constituent instrument to the contrary or the doctrine of *rebus sic stantibus* can be called in aid.

Dr. Singh undoubtedly examines a matter of fundamental importance. If a State can for all practical purposes be expelled from an international organization by the refusal of representation to its effective government, the very foundation of the organization is weakened and absurd results may follow. Even more is this so where another government totally devoid of power is retained as the representative of the State, and may take decisions which it cannot carry out and which may well be repudiated by the only effective government. In seeking to show that international law does not lead to such unreal situations, which are brought about rather by a breach of international law, the author fulfils a useful purpose.

D. C. HOLLAND

International Law Studies, 1955: The Law of War and Neutrality at Sea. By R. W. TUCKER. Newport: United States Naval War College. Washington: United States Government Printing Office. 1957. xiii + 448 pp. \$2.25.

Professor Tucker divides his work into three parts. The first part may be regarded as falling into two distinct sections of subject-matter. The first of these sections consists of a general consideration of the law of war and the application of the rules of warfare. The second section—introduced by a discussion of the evolution of new rules of law established by the practice of States during the First and Second World Wars—is comprised of a general and specific inquiry into topics relating exclusively to the law of war at sea. The second part of the book is concerned mainly with neutrality and with the respective rights of neutral and belligerent parties in relation to one another. In particular reference is made to the right of visit, search and seizure of ships and property, and to contraband and blockade. Finally, in the third part of the book Professor Tucker sets out what might be described as a codified dissertation on the rules of naval warfare relating to material contained in the previous pages.

The author is of the opinion that the rules of sea warfare both in relation to the belligerents *inter se*, and with regard to the relationship subsisting between the belligerents and third parties, have been drastically modified by the two World Wars. He believes that the essential dividing line, in point of time, between the traditional and the more modern practice, is to be found in 'the outbreak of the first World War in 1914' (p. 26), but he points out that it was not until after the experiences of the Second World War that States really perceived the radical nature and the great extent of the change in the rules of warfare of which their own practices provided ample evidence.

Professor Tucker quickly comes to grips with the perennial problem of the legal nature and binding force of the laws of war and with the question of the region and degree of their application. He considers the related question of the enforcement of the law of war at the end of his first part. It is here where he rightly recognizes that reprisals are not merely acts of retaliation or revenge—however much they may in practice be flavoured with the taste of vengeance—but are a legitimate and important sanction the object of which is to compel compliance with the law of war by the party against which they are taken. Perhaps unfortunately Professor Tucker does not examine too closely the feasibility of the provisions of the Geneva Conventions of 1949 regarding the right of reprisal action. And whereas it is true that the most optimistic and unrealistic limitation upon reprisals is to be found in the Geneva 'Civilians' Convention with which the law of sea warfare has least concern it would seem that the author missed an opportunity of discussing the practicability of those provisions of these conventions that relate to reprisals.

Professor Tucker briefly but thoroughly discusses the problem of the extent to which the rules of warfare are to be regarded as operative in an illegal war, or a war of aggression. He rightly rejects the eclectic and quasi-political—the neo-theological and philosophical—doctrines sometimes expounded to the effect that the innocent party is entitled to better protection from the rules of warfare than the aggressor. In this matter his view is of the utmost importance since it is the only practical and realistic approach to the question in issue. Professor Tucker refers not only to the practice of tribunals immediately following the Second World War but also to the reason of the thing. It is unquestionable that the quickest way to excesses is by disobedience of the rules of warfare. If one belligerent claims to be the innocent victim of aggression and for this reason alone asserts its right to resort to reprisals against the aggressor, these reprisals taking the form of a disregard for one or more of the substantive rules of warfare, it is

undoubted that its opponent—armed now with considerable justification—will only too readily follow the example of its adversary. It is then but a short path to the lawless abandonment of the most fundamental of the laws of war. Aggression is not prevented, still less is it cured, by denying to the aggressor the rights of a belligerent. The object of the law of warfare—an object which despite adverse criticism is largely achieved—is to humanize conflicts so far as this is possible. Resort to reprisals for any purpose but as a sanction for violation of the rules of warfare themselves is, therefore, not the upholding, but the negation, of international law.

While it is true that land, sea and air warfare may be treated as referable to almost distinct and separate branches of law, if such a process is taken to excess it tends to lead to inconsistencies and anomalies which are in evidence in relation to the rules governing bombardment and the capture of property. Professor Tucker alludes to some of these anomalies but—apart from those concerned with bombardment—clearly regards them as beyond the scope of his work. To some extent at least this must be regretted as a closer examination and comparison of the similar rules applicable to the different media of operation would be instructive.

In general the author's treatment of his subject-matter is more than adequate, a great deal of factual information being provided in the copious footnotes which appear on nearly every page. It may, of course, be said that the reading of footnotes distracts the attention of the reader and breaks the thread of the author's reasoning in the reader's mind. On the other hand, it is perhaps equally true that the interspersing of allusions, citations and quotations of authorities in the substance of the text itself may cause no less distraction from a line of reasoning. There must always be some kind of compromise between the steps in an argument and the authority for the taking of those steps and if a writer is willing to find room in his work for points of view with which he does not necessarily agree—and still more if he is willing to put forward the substantive bases for these opposing opinions—he is driven to the provision of extensive footnotes. Professor Tucker generously collects points of view other than his own and presents them to his reader along with the authorities which may be said to support them.

An interesting source of information—currently significant apart from the purposes of the law of naval warfare—is to be found in a list of States and a corresponding indication of their respective claims with regard to the extent of their territorial waters and other jurisdictional zones (p. 385 et seq.). Similarly, practical information and instruction, useful to naval officers in the course of a visit and search on the high seas, bears further witness to the empirical nature and pragmatic value of Professor Tucker's work.

If the duty of a reviewer were to look for faults in what he reviews he would find himself confronted with a singularly difficult task in relation to this book. The author has undoubtedly attained a commendable balance of brevity of expression and completeness of information, at the same time providing a full statement of the current views of the United States Naval War College upon the subject-matter. The layout of the volume makes both for pleasant reading and for facility of reference.

D. J. L. BROWN

The International Court of Justice. By S. ROSENNE. Leyden: A. W. Sijthoff, 1957. xxvi+592 pp. £4. 10s. od.

This book is a full-length study of the International Court of Justice by the Legal Adviser to the Israeli Ministry of Foreign Affairs who, under the name S. Rowson, is

familiar to readers of this *Year Book* as a contributor of articles on prize law in 1946 and 1947.

Rosenne's book on the present Court inevitably invites comparison with Hudson's now classic work on the Permanent Court of International Justice. But, although the two books are certainly comparable in their scope and scholarship, the aims and method of Rosenne are somewhat different from those of Hudson. The latter sets out to provide international lawyers with a comprehensive textbook on the constitution, jurisdiction and procedure of the Permanent Court, and 'Hudson' has proved itself to be an invaluable aid to all practitioners in the Court. Out of date though it now is, 'Hudson' is still frequently consulted by practitioners before the new Court and 'Rosenne', by reason of its somewhat more discursive and more political treatment of the subject, may not altogether replace Hudson as the practitioner's working textbook on the Court.

Rosenne states in his preface that the object of his book is to 'examine the interplay of political and legal factors having a bearing upon the International Court of Justice and the role it is called upon to play in modern international intercourse'. The political nature of the Court's function is also made the central theme of his Introduction. The designation of the Court as a principal organ of an essentially political organization, says Rosenne, emphasizes that international adjudication is a function which is performed within the general framework of the political organization, and that the Court has a political task to perform—that is, a task related to the pacific settlement of disputes and hence to the maintenance of international peace. International adjudication is a political operation and its political character affects the litigating States in their handling of the case, even after they have had recourse to the Court, although in a subdued measure owing to the special discipline imposed on them by the law and by the procedure of litigation. The political factor emerges to the fore again after judgment when the litigating States are faced with the problem of complying with what has been decided. International litigation is 'but a phase in the unfolding of a political drama'. Rosenne goes on to affirm that judicial settlement does not mean the displacing of the political nature of the process of reaching the settlement by some other process. All it means is that the technique by which the dispute is resolved is modified through the voluntary surrender by the disputants of their right to solve the dispute directly. And he concludes: 'Once it is admitted that there is a close inter-relation between political and legal factors, and that the function performed by the Court in the ultimate analysis is a political one, much of the practice and procedure of the Court and of the attitude of States towards the Court, come to be seen in a new perspective.'

The heavy emphasis placed in the Introduction on the political nature of the Court's function is believed by the present reviewer to be open to misconstruction. All courts of law operate within the general framework of a political organization and they have as their assigned task within that organization the peaceful settlement of disputes according to law and the maintenance of 'peace' between one subject of the law and another. Granted that the United Nations is an organization which is political in the highest degree; granted also that the parties to international litigation—States—are highly political entities and over-mighty subjects of the law. But do these facts really change the essential function of the International Court from a judicial to a political function? Is not the difference between international and municipal adjudication one of degree rather than of kind? Certainly, international law itself draws a clear distinction between the political function of conciliation and the judicial function of adjudication. Similarly, it seems to be going too far to say that in the international sphere judicial settlement does not mean the displacing of the political nature of the process of reaching a settlement by some other process. If this is really the case, it is surprising that the

Court should so strongly insist, as it has done, on a number of occasions, on the judicial character of its function. No one who has taken part in contentious litigation before the Court can have failed to sense the radical transformation which the handling of a dispute undergoes on its transfer from the political sphere of diplomacy to the judicial sphere of the Court. Something of the same kind takes place even in municipal law where the parties usually begin by seeking a settlement by negotiation and only transfer their dispute to the courts when the negotiation fails. The real difference between international and municipal adjudication, it is believed, lies not in any fundamental difference in the function of the court but in the power—the over-mightiness—of the litigants in the international sphere which does give a special character to international adjudication. True, the subject-matter of international litigation is in the nature of things more often concerned with high matters of State than is the case in municipal litigation. But the *function* of a court does not cease to be judicial and become political merely by reason of the case before it having a political background and political implications.

To insist on the judicial character of the Court's function is not to question the importance of a correct understanding of the political background to the Court and its work. In the body of the book political factors are for the most part placed in their right perspective, and the exposition gains in interest from the balancing of political as well as legal considerations. But to characterize international adjudication as a political operation and the function of the Court as in the last analysis political is to encourage ideas which, if they made headway, would assuredly undermine the authority and usefulness of the Court. The more political the climate within the United Nations, the more important it seems to the present reviewer that the Court's own insistence on the judicial nature of its function should receive the fullest acknowledgement and support from lawyers.

This reservation having been expressed, it must at once be said that Rosenne's book is a work of high quality which certainly bears comparison with that of Hudson. A little less strictly formulated and a little more controversial than 'Hudson', Rosenne's book is, on the other hand, perhaps more stimulating and, in some respects, more interesting. It is divided into three Parts: (1) The Court as Part of the Machinery of Diplomacy, (2) The Organization of the Court and (3) Practice and Procedure.

Part I contains three chapters dealing with the transition from the old to the new Court, the constitutional framework of the Court, its political and judicial role and the execution and enforcement of its decisions. Part II also contains three chapters covering such matters as the election and service of judges, *ad hoc* judges, the registrar and registry staff, assessors, witnesses and experts, the budget and property of the Court and the work of the Registry. These two Parts together provide a lucid and workman-like account of the constitution and practical organization of the Court. Of special interest perhaps are the sections in Chapter III in which the relations between the Court and the United Nations and Specialized Agencies are discussed and Chapter IV which is entitled 'The Execution and Enforcement of Decisions of the Court'. In the former Rosenne collects the various indications in the jurisprudence of the Court as to the implications of the position of the new Court as 'the principal judicial organ of the United Nations'. In the latter he examines the question of compliance with the Court's decisions in the light of the provisions of the Charter and Statute, the *dicta* of the Court on the point and the reactions of States to the decisions of the present Court and its predecessor. This chapter has met with criticism from one eminent authority¹

¹ Sir Hersch Lauterpacht, Q.C., in a review in *International and Comparative Law Quarterly*, 7 (1958), pp. 200-1.

on the grounds (a) that it includes material—i.e. the *Monetary Gold* case, the failure of Iran to comply with the Court's indication of interim measures in the *Anglo-Iranian Oil Co.* case and the *Haya de la Torre* case—which does not directly relate to 'execution' or 'enforcement' of the Court's 'decisions', and (b) that it exaggerates the problem of 'enforcement'. While there is force in these criticisms, the reactions of States to the Court's decisions are a matter of real interest, and some of the edge might have been taken off these criticisms if the title of the chapter and the treatment of the subject had been slightly modified. The title and the treatment, by seeming to assimilate compliance with international decisions too closely to execution of municipal judgments, tend to give a wrong orientation to the discussion. Securing compliance by a State with the judgment of a court even in a federation is a very different problem from obtaining 'execution' against an individual or corporation, as Governor Faubus has shown, and in the international sphere this difference is reflected in the very circumspect provisions of Article 94 of the Charter. Although a less challenging motif than 'execution and enforcement' might have resulted in a better balanced account, this chapter does, it is thought, provide useful indications of the difficulties which may arise after judgment.

Part III, the main body of the book, deals with interpretation of the Statute, access to the Court, jurisdiction, procedure and practice, the Court's decision, advisory proceedings and extra-judicial activity. Here the author displays a very considerable mastery of the jurisprudence and practice both of the new and the old Court. The exposition is clear, the comment incisive; and even those who believe themselves to be tolerably familiar with much of the material will find that Rosenne quite frequently finds an unsuspected point or puts a familiar point in a somewhat new light. The high standard and originality of the work in this Part make it certain that 'Rosenne' will prove to be of great value to academic and practising international lawyers alike. Already the book is beginning to be quoted alongside 'Hudson' as an authoritative textbook on the Court.

C. H. M. WALDOCK

Human Rights and the United Nations. By RAGHUBIR CHAKRAVARTI (Foreword by PROFESSOR G. D. H. COLE; Introductory Note by N. S. MARSH). Calcutta: Progressive Publishers. 1958. 213 pp. £1. 2s. 6d.

This book is based on a thesis which the author wrote for the degree of B.Litt. of the University of Oxford. It deals with the question of human rights in relation to the United Nations. Although comparatively short it yet succeeds in giving a comprehensive (and well annotated) account of the problems and difficulties involved in establishing any international legal protection of human rights and of the progress so far made both outside and inside the United Nations. It gives also a short but interesting statement of the author's views on the question of future developments.

Mr. Chakravarti does not fall into the trap of facile optimism or over-idealism. He recognizes the limited advance so far made and the unlikelihood of any substantial step forward in the foreseeable future. He discusses the difficulty of establishing any generally acceptable objective standard of human rights in a world divided by ideological differences and in which even States of similar ideological views differ greatly in their economic and social progress and in the amount of importance which they attach to civil and political rights as compared with economic, social and cultural rights. He points out that, even if it were now possible adequately to formulate 'Human Rights' as a body of acceptable legal rules, there would be even greater difficulty in establishing some form

of legal sanction for enforcing those rules which would not be either ineffective or capable of misuse. He never loses sight of the basic problem of the whole movement for the international protection of human rights, the doctrine of State sovereignty. At one point he even says: 'The doctrine of State Sovereignty and the concept of international protection of human rights are incompatibles.'

Yet the author's views, though realistic, are never pessimistic or merely negative, as, for example, his discussions of the contributions, both direct and indirect, already made by the United Nations show. Chapters II and III are devoted to the evolution and legal effects of the provisions of the United Nations Charter relating to human rights and fundamental freedoms, which he regards as 'guiding principles of the new world organization'. There is in particular an interesting if controversial account of the effect of Article 2 (7). He sees the Universal Declaration of Human Rights, which is discussed in Chapter IV, as an elaboration of the Charter principles of human rights, and as 'groundwork for the future developments of human rights in international law', though he recognizes that 'it serves at best the purpose of a moral guide'. He also gives examples of the *legal* effects which the Charter and the Declaration have had in municipal courts and legal systems and of the effect of the Declaration on States administering trust territories where there is a case of *direct* control by the General Assembly working on the principles expressed in the Declaration.

Chapter V is an account of the ambitious attempt by the United Nations to formulate Covenants, intended to be legally binding, as the second part of the proposed International Bill of Rights. Mr. Chakravarti considers the fundamental problems which have been brought to light in the course of this attempt and sees little immediate hope of its success, feeling that a revolutionary change in the outlook of States is necessary. However, he is not wholly pessimistic about the Draft Covenants, seeing in them a 'moral value and stimulus'. He looks to possible regional unions of States with a similar background and inheritance as the most likely means of early progress. It is therefore not surprising that he also devotes some space to the European Commission of Human Rights.

The book continues with a chapter on the 'so-called right of Self-Determination', which is necessarily somewhat inconclusive, and one on human rights in non-self-governing and trust territories and ends with a conclusion in which the author's arguments and findings are well marshalled and summarized.

The book is marred by a number of printing and spelling errors. The author's English is sometimes rather quaint, and careful reading is occasionally required to elicit his meaning. These, however, are but minor blemishes in a commendable and useful study of a vital problem.

A. ROGERSON

Comunicazioni e Studi. Volume VIII. Edited by R. AGO, M. GIULIANO, P. ZICCARDI, A. MIGLIAZZA and L. LUZZATI LENGHI. Milan: Giuffrè. 1957. 520 pp. Lire 3,500.

The eighth volume of this valuable *Year Book* follows its well-established pattern. Articles on public and private international law, summaries of the practice of the International Court of Justice and of Italian courts and copious book reviews make up its content.

R. de Nova, taking up the threads of an earlier study, examines the legal effects of the unilateral declaration of permanent neutrality made in 1955 by Austria. He con-

cludes that even a unilateral declaration is binding upon the declarant, while other States are only under a duty to respect it if they have recognized the new status. He admits that declarations of this character may be conditional upon a unilateral guarantee by others or upon consent expressed in a treaty and discerns, thus, like Bindschedler, two distinct types of permanent neutrality. Nevertheless, he contends that a unilateral declaration of neutrality, followed by recognition, is not a bilateral transaction, but a series of unilateral acts. It is to be hoped that the learned author will take the opportunity, one day, of examining in detail what rights and what duties arise out of these various types of unilateral declarations, either separately or taken together.

Turning to the compatibility of an assumption of permanent neutrality with membership of the United Nations, he finds that the admission of Austria to the United Nations Organization in December 1955 following the previous declaration of permanent neutrality amounts to an implicit recognition by all other Member States that the duties under the Charter can be reconciled with the assumption of permanent neutrality by the new member, whose capacity to join international organizations of a functional type remains, however, severely restricted. The author concedes that, while such an interpretation may not be in conformity with the tenor of the Charter itself, it may constitute a stage in the development of a living law.

M. Giuliano discusses the topical problem of the place of nationality of individuals in international law. Proceeding from the accepted principle that, in the absence of treaties, the determination of nationality is a matter of domestic jurisdiction, he states that this principle holds good even in face of a practice which purports to rely on limitations determined by customary international law. While denying the existence of rules bearing directly upon a duty not to confer nationality either generally or in particular circumstances, he contends that indirectly States may be precluded from relying on the tie of nationality in pressing claims. He thus takes up a position similar to that of the International Court of Justice in the *Nottebohm* case. He illustrates his thesis by reference to the particular circumstances in which that Court applied a restriction on the right of a State to characterize a claim as national, as well as by reference to the limits placed on the right of a defendant State to resist a claim on the ground that the individual concerned is also a national of the latter. On the second point he cites the consistent practice denying South American States the right to impose upon foreigners local nationality in virtue of the acquisition of land or of residence. On the first point, while the author cites with approval the principle established in the *Nottebohm* case, he fails to take into account the considerable critical literature which has grown around it. As to The Hague Convention on Double Nationality his opinion is that it envisages solely a duty to recognize the operation of foreign nationality legislation as a fact which brings into operation the rules regarding the treatment of aliens and the right to sponsor a claim based on injury to the individual concerned. It does not extend to the process of ascertaining the nationality of an individual. This thesis coincides in part, and partly develops further, a similar argument expounded by Parry in the *Festschrift für Makarov*, Z. a. ö. R. V. 19 (1958), pp. 337-68 and offers, at present, an accurate and fruitful assessment of the legal position. In the light of these general considerations, the author studies the regulation of nationality problems arising from a cession of territory and concludes that in this regard only treaties, but not customary international law, provide international solutions.

G. Sperduti deals with the nature of the European Coal and Steel Community. In his view it is a supranational authority made up of a partial union possessing a territory of its own and special (including judicial) functions. Its members, who alone can alter its constitution, are bound to co-operate with the Community and to carry out its

recommendations. Within the Community's special sector of competence, they are represented in their external relations by the High Authority.

G. Spini, in a lightly written essay, surveys as a historian the attempts throughout the centuries to create an international organization of nations, with special regard to the religious foundations of these movements.

L. M. Bentivoglio has selected as his subject the nature of the connecting factors employed in private international law. Starting with the old, yet still live, controversy whether connecting factors have a factual or a legal connotation, with a recent assertion of a theory of equally venerable age that they are unilateral delimitations of the sphere of operation of the *lex fori* and with the sociological interpretation of their function, the author rejects all these theories. Instead he holds that all connecting factors have a legal connotation, even if they seem to establish a factual link between the operative facts and a system of laws, but adds that, in the last resort, the law referred to must interpret the connecting factor according to its own notions and thus must determine whether it is applicable in the courts of the *forum*. Such a theory, as the author says himself, differs indeed greatly from the traditional views, but it must be doubted whether the examples taken from the private international law of contract are valid exceptions to the general principle that the *lex fori* itself must define the meaning of connecting factors established by it. Free choice of law and place of contracting contain voluntaristic elements which can only be resolved by reference to the validity of the contract itself. Whether the law which would govern the contract, if it had been validly concluded, must determine this question, or whether the technique, derived from the law of arbitration, is adopted of separating the choice of law agreement from the body of the contract itself (as the author seems to advocate), these instances remain isolated.

F. Bianchi examines the jurisdictional limits of Article 169 of the Italian Regulations concerning Civil Status of 9 July 1939 according to which Italian courts are competent to rectify acts affecting civil status transmitted from authorities abroad which have been registered in Italy and to draw up such acts which should have been carried out by authorities abroad and subsequently registered in Italy.

In an elaborately argued essay, L. Marmo considers whether international law is to be classified as public or private law. His conclusion, based on dogmatic reasons, is that this distinction cannot be applied to a system as a whole.

In a highly informative and very well documented article, A. Ruini gives an account of the status of armed forces abroad in time of peace. He covers the period from the time of the postglossators until the nineteenth century and thus provides a valuable supplement to the studies in the same field by Barton.

The usual surveys of the practice of the International Court of Justice and of Italian courts, both in matters of public and private international law (Migliazza, Fabozzi and Citarella) are carried up to the end of 1955. The analytical account of the Italian literature has been omitted from this number, but the part devoted to reviews of books and periodicals is extensive.

K. LIPSTEIN

Académie de Droit International de la Haye: Recueil des Cours, 1956. Volume 90. Leyden: A. W. SIJTHOFF, 1957, 958 pp. (plus 20 pp. Index).

The second volume of the *Recueil des Cours* for 1956 opens with a lecture by Max Kohnstamm, until lately Secretary of the High Authority, on 'The European Coal and Steel Community'. Mr. Kohnstamm views the steady growth of this organization as 'one of the most significant attempts to transcend the nation state's limitations' (p. 5)

and believes that the Schuman Plan and Treaty have succeeded in changing both the economic and political structure of Europe in a fundamentally different way from that which would have followed a more gradual liberalization of trade. His arguments, that there even now can be seen a more rational and stable pattern of European trade, together with marked improvements in productivity, modernization and conditions of work, are presented modestly and with optimism for the future. To the international lawyer, however, the focus of attention will lie in the legal and political implications of this new 'regional arrangement'. For example, is the federal character of the Community really little more than a convenient legal fiction behind which traditional international negotiations continue to take place? Mr. Kohnstamm rejects this criticism; his own special experience enables him to support the legality and objectivity of decisions taken both in the Court of Justice and in the Common Assembly. In spite of deficiencies in the organization as it stands, such as the lack of an independent executive authority or of a Council designed to extend the liaison between national governments and the High Authority, the Community has at least shown that Europeans, linked by a common interest, are capable of working and obeying a federal institution.

Professor M. J. de Soto, in his course of lectures on 'Les relations internationales de la Communauté européenne du charbon et de l'acier', considers in much greater detail the legal nature of the Community as an institution possessing limited international personality. After describing the international competence and representation of the Community, Professor de Soto outlines the development of its relations with a number of third States, notably Switzerland, Great Britain and the U.S.A. The 'accord d'Association' between the Community and Great Britain is treated at some length, and, not unnaturally, the negotiations come in for strong criticism: 'L'attitude de Grande-Bretagne à l'égard du Plan Schuman avait été une vive déception pour nombre de partisans de l'idée européenne' (p. 64). This valuable and constructive study is concluded with a survey of the relationships between the Community and other analogous institutions, particularly G.A.T.T., O.E.E.C., I.L.O. and the Council of Europe; Professor de Soto shows that the position of the Community in international law is still far from settled and that its status may well in the future have to be worked out without regard to the limitations of the original Treaty.

In a third study of the Community, Professor Henri Rieben, of the University of Lausanne, contributes a course entitled 'De la cartellisation des industries lourdes européennes à la Communauté européenne du charbon et de l'acier', which supports, in detail, many of the more general economic claims advanced in the opening lecture of the volume and envisages a gradual, but complete, revolution in Western European standards of living.

In the following course of lectures Professor Rudolf Bindschedler examines once more, under the title of 'La protection de la propriété privée en droit international public', the limits of expropriation under international law, with especial reference to the right of diplomatic protection and the principles underlying claims and procedures of indemnification. This is a vital and increasingly recurrent problem, and few would disagree with the author that 'La certitude de cette protection — et de son efficacité — est la condition indispensable du développement économique du monde libre; elle seule assurera l'afflux de capitaux aux pays qui en ont besoin' (p. 296). But how it is possible to achieve at the present time common international standards of indemnification? Even in this country the Foreign Compensation Commission, which is doing much valuable work, reaches its decisions, which are without appeal, on the basis of the municipal law. Professor Bindschedler does not advance any solution to existing problems such as this, but he does suggest that if the investment of foreign capital in

the 'less responsible countries' could in some way be regulated through an international agency then both security for the investing power and a reasonable freedom from the fear of foreign financial domination over the national economy concerned could be achieved.

In his lectures on 'La révision de la Charte des Nations Unies' Professor E. Giraud contributes an outspoken but penetrating analysis of some of the deficiencies in form, interpretation and application of the Charter. He gives a succinct exposition of the Charter's lack of balance, of the unreality resulting from the existing system of state representation, and of the effect on the General Assembly of the deadlock in the Security Council. His desires to see voting by an unqualified majority in the Security Council, together with a more liberal interpretation of the Charter and the establishment of the compulsory jurisdiction of the International Court of Justice, will of course meet with widespread approval; yet these matters must ultimately depend for their remedy on the prior establishment of some substantial political accord between the great powers. Meanwhile, Professor Giraud believes that some progress toward reform of the Charter might be possible if the International Court took fuller advantage of its powers of interpretation and if (here he follows the lead set by the Geneva Protocol of 20th October 1924) states refusing to submit differences or to abide by decisions of the Court were condemned to forfeit the protection of Article VII of the Charter. His study is throughout a stimulating appraisal of a situation which many international lawyers refuse to regard save with unqualified pessimism.

In complete contrast, Professor Georges Ténékidès's 'Droit international et communautés fédérales dans la Grèce des cités' is esoteric and even forbidding at first sight. Yet it is, in fact, an important contribution to the neglected historiography of the law of nations. Professor Ténékidès shows very clearly, after outlining the nature of the juridical institutions which most closely affected inter-state relationships, that Greek practice of the third, fourth, and fifth centuries before Christ can still present valuable illustrations of the operation of treaties, methods of arbitration and mediation, and the protection of foreign nationals and their property. The theme of opposition between the federalist and imperialist movements is well brought out; the text has very full footnotes and there is an excellent and comprehensive bibliography.

The course of lectures by Mr. Clive Parry, entitled 'Some considerations upon the protection of individuals in international law', amounts to much more than the author's typically modest claim of 'little more than a commentary upon recent cases' (p. 723). After a striking comparison between the literary treatment of his topic today and a mere thirty years ago, Mr. Parry goes on to suggest that the delictual hypothesis of state responsibility is now no longer valid. This part of international law is obviously in a state of expansion and the scope and boundaries of the right of protection of individuals are both unsettled. New problems have tended to replace the older controversies; notably the question of how far international organizations possess the rights (and the duties) of this kind of protection. Mr. Parry, in outlining these developments in a short conspectus of the subject, gives a particularly interesting treatment of the changing relationship between nationality and protection, and exposes the weaknesses implicit in the recent *Nottebohm* decision (p. 704 et seq.). It is to be regretted that he is unable also to examine in some detail the award of the Anglo-Greek arbitral tribunal in the *Ambatielos* case; he succeeds, however, throughout, in drawing attention to the state of flux in which the law on this subject is to be found.

Professor G. Sperduti contributes a course on 'L'individu et le droit international' which adopts a very different approach; he is concerned primarily with the individual as a subject of international law and attempts with some success the task of placing

recent developments in the field of the protection of human rights in their wider political and economic perspective. Professor Sperduti is careful to keep the legal issues in the forefront of his argument and provides a useful review of the rights of access of an individual to international organizations, together with a convincing appraisal of the various technical assistance programmes now in operation.

The final course of lectures included in the present volume, entitled 'Science juridique et droit international', offers in many ways the most difficult material either to assess or to appreciate. Professor Ago, in seeking to explain (and to justify) the juridical status of international law, tests its nature by reference in turn to the naturalist, positivist, realist, sociological and 'pure' theories of law. Unfortunately, compression is occasionally responsible for some rather misleading implications; this is particularly noticeable in his treatment of the early naturalist writers ('les conceptions pré-positivistes', p. 861 et seq.) and in his treatment of the 'revived' natural law theories (p. 900 et seq.). Yet any criticism of a study such as this, which covers very ably so much ground in such a short space, must necessarily be on questions of emphasis; Professor Ago's final thesis, even if not novel, is persuasively and cogently advanced: 'Seul l'emploi de notions fausses à l'égard du caractère même de la juridicité, seule l'intervention d'idées préconçues et de déformations non scientifiques du concept du droit ont pu être la cause des doutes qu'on a vu poser à cet égard dans le développement historique des théories' (p. 951).

K. R. SIMMONDS

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